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No. ~~OFFICE OF THE CLERK~~

In The  
**Supreme Court of the United States**  
October Term, 1996

STATE OF MONTANA; MARY BRYSON;  
BIG HORN COUNTY; and MARTHA FLETCHER,  
*Petitioners,*

v.

CROW TRIBE OF INDIANS; and  
UNITED STATES OF AMERICA,

*Respondents.*

On Petition For A Writ Of Certiorari  
To The United States Court Of Appeals  
For The Ninth Circuit

**PETITION FOR A WRIT OF CERTIORARI**

CARTER G. PHILLIPS  
PAUL E. KALB  
C. FREDERICK BECKNER  
SIDLEY & AUSTIN  
1722 Eye Street, N.W.  
Washington, D.C 20006  
(202) 736-8000

CHRISTINE A. COOKE  
Big Horn County  
Attorney  
Drawer H  
Hardin, MT 59034  
(406) 665-2255

JOSEPH P. MAZUREK\*  
Attorney General  
CLAY R. SMITH  
Solicitor  
Justice Building  
P.O. Box 201401  
Helena, MT 59620-1401  
(406) 444-2026

JAMES E. TORSKE  
314 North Custer Avenue  
P.O. Drawer F  
Hardin, MT 59034  
(406) 665-1902

*Counsel for Petitioners*

May 1997

*\*Counsel of Record*

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**QUESTION PRESENTED**

May an Indian tribe, or the United States on the tribe's behalf, recover in quasi-contract from a State and a county taxes paid pursuant to state law by a third-party taxpayer that has waived any entitlement to a refund?

## PARTIES

All of the parties are listed in the caption.

## TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
PARTIES .....	ii
TABLE OF CONTENTS .....	iii
OPINIONS BELOW.....	1
JURISDICTION.....	2
FEDERAL LAW INVOLVED .....	2
STATEMENT .....	2
A. Factual Background .....	2
B. Proceedings Below.....	4
1. <i>Crow I</i> and <i>Crow II</i> .....	4
2. <i>Crow III</i> .....	5
3. <i>Crow IV</i> .....	6
REASONS FOR GRANTING THE PETITION .....	11
I. THE NINTH CIRCUIT'S DECISION CON- FLICTS WITH THIS COURT'S HOLDING IN CALIFORNIA.....	13
II. THE NINTH CIRCUIT'S DECISION CON- FLICTS WITH THE TENTH CIRCUIT'S DECI- SION IN <i>UTE INDIAN TRIBE v. STATE TAX</i> <i>COMMISSION</i> .....	18
III. THE NINTH CIRCUIT'S DECISION HAS EXCEPTIONAL LIABILITY CONSEQUENCES NOT ONLY FOR THE PETITIONERS BUT ALSO FOR ALL STATES THAT TAX TRANS- ACTIONS IN INDIAN COUNTRY .....	19
CONCLUSION .....	22

## TABLE OF CONTENTS - Continued

	Page
APPENDIX	
Opinion of Ninth Circuit Court of Appeals (filed August 6, 1996), reported at 92 F.3d 826 ....App.	1
Order of Ninth Circuit Court of Appeals (filed October 29, 1996), amending opinion entered August 6, 1996, reported at 98 F.3d 1194....App.	15
Findings of Fact, Conclusions of Law and Judgment of United States District Court (filed November 23, 1994) .....	App. 17
Order of Ninth Circuit Court of Appeals (filed July 23, 1992), reported at 969 F.2d 848 .....	App. 58
Opinion and Order of Certification for Interlocutory Appeal of United States District Court (filed May 29, 1991) .....	App. 61
Memorandum Opinion and Order of United States District Court (filed December 26, 1990) ....App.	67
Order of United States Supreme Court (filed January 11, 1988) affirming judgment of Ninth Circuit Court of Appeals entered on June 11, 1987, reported at 484 U.S. 997 .....	App. 87
Opinion of Ninth Circuit Court of Appeals (filed June 11, 1987), reported at 819 F.2d 895.....App.	88
Findings of Fact, Conclusions of Law of the United States District Court (filed September 10, 1985), reported at 657 F. Supp. 573.....App.	110
Order of Ninth Circuit Court of Appeals (filed January 5, 1982) amending opinion entered July 13, 1981, reported at 665 F.2d 1390 .....	App. 167
Opinion of Ninth Circuit Court of Appeals (filed July 13, 1981), reported at 650 F.2d 1104 ....App.	169

## TABLE OF CONTENTS - Continued

	Page
Memorandum Opinion and Order of United States District Court (filed April 3, 1979), reported at 469 F. Supp. 154.....App.	197
Order of Ninth Circuit Court of Appeals denying Appellees' Petition for Rehearing with Suggestion for Rehearing En Banc (filed February 21, 1997).....App.	228
Omnibus Indian Mineral Leasing Act of 1938, as amended and codified at 25 U.S.C. §§ 396a-396g .....	App. 230
1975 Montana Laws chapter 525, §§ 1-12... ..App.	234
Plaintiff-Intervenor United States' First Amended Complaint (filed December 26, 1990).....App.	243
Plaintiff Crow Tribe's Fourth Amended Complaint For Restitution (filed October 11, 1989) ....App.	252

## TABLE OF AUTHORITIES

Page

## CASES

<i>Bayne v. United States</i> , 93 U.S. 642 (1877).....	14, 15, 17
<i>City of Philadelphia v. Collector</i> , 72 U.S. 720 (1866) ....	15
<i>County of Yakima v. Confederated Tribe &amp; Bands of Yakima Indian Nation</i> , 502 U.S. 251 (1992).....	20
<i>Crow Tribe v. Montana</i> , 469 F. Supp. 154 (D. Mont. 1979), <i>rev'd</i> , 650 F.2d 1104 (9th Cir. 1981), <i>amended</i> , 665 F.2d 1390 (9th Cir.), <i>cert. denied</i> , 459 U.S. 916 (1982) .....	4, 6, 8, 16
<i>Crow Tribe v. Montana</i> , 657 F. Supp. 573 (D. Mont. 1985), <i>rev'd</i> , 819 F.2d 895 (9th Cir. 1987), <i>aff'd mem.</i> , 484 U.S. 997 (1988).....	5, 6, 16
<i>Crow Tribe v. Montana</i> , 969 F.2d 848 (9th Cir. 1992) .....	5, 6, 7, 10
<i>Gaines v. Miller</i> , 111 U.S. 395 (1884).....	14, 15, 17
<i>Oklahoma Tax Commission v. Chickasaw Nation</i> , 115 S. Ct. 2214 (1995).....	20
<i>Saltonstall v. Birtwell</i> , 164 U.S. 54 (1896).....	15
<i>Stone v. White</i> , 301 U.S. 532 (1937) .....	15
<i>United States v. California</i> , 507 U.S. 746 (1993) ...	<i>passim</i>
<i>Ute Indian Tribe v. State Tax Commission</i> , 574 F.2d 1007 (10th Cir.), <i>cert. denied</i> , 439 U.S. 965 (1978) ...	12, 18, 21
<i>Valley County v. Thomas</i> , 97 P.2d 345 (Mont. 1939) ....	15

## FEDERAL MATERIALS

## United States Code

Tit. 25, §§ 396a-396g.....	4
Tit. 28, § 1254(1).....	2

## TABLE OF AUTHORITIES – Continued

Page

Tit. 28, § 1292(b) .....	5
Tit. 28, § 1345 .....	5

## MONTANA MATERIALS

## Montana Code Annotated

§ 15-1-401 (1979) .....	3
§ 15-1-402 (1981) .....	3
§ 15-1-402 (1979) .....	3
§ 15-1-406 (1981) .....	3
§ 15-2-301 (1981) .....	3
§§ 15-2-303 to -306 (1981).....	3
§§ 15-23-701 to -707 (1995).....	3
§§ 15-35-101 to -205 (1995).....	2
§ 15-35-114 (1981) .....	3

## Montana Laws of 1975

Ch. 525 §§ 1-8.....	2
Ch. 525 §§ 9-12.....	3

## OTHER AUTHORITIES

## Restatement of Restitution

§ 75.....	15
§ 160, cmt. a (1971).....	13

## TABLE OF AUTHORITIES - Continued

	Page
George E. Palmer,	
<i>Law of Restitution</i> (1978) .....	13, 15
Thomas M. Cooley, <i>Law of Taxation</i> (Albert Poole Jacobs ed., 1903) .....	15

## PETITION FOR WRIT OF CERTIORARI

Petitioners State of Montana, Mary Bryson in her capacity as director of the Montana Department of Revenue, Big Horn County, Montana, and Martha Fletcher in her official capacity as treasurer of Big Horn County, Montana, hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

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 OPINIONS BELOW

The final opinion of the Ninth Circuit in this case is reported at 92 F.3d 826 and 98 F.3d 1194 and is reproduced in the Appendix commencing at App. 1. Prior decisions in this matter by the court of appeals are reported at 650 F.2d 1104 (1981), *amended*, 665 F.2d 1390 (1982), and reproduced in the Appendix commencing at App. 167 and 169; at 819 F.2d 895 (1987), and reproduced in the Appendix commencing at App. 88; and at 969 F.2d 848 (1992), and reproduced in the Appendix commencing at App. 58. A prior summary affirmance of the court of appeals' 1987 decision is reported at 484 U.S. 997 (1988) and is reproduced in the Appendix at App. 87.

The opinion of the district court is unreported and reproduced in the Appendix commencing at App. 17. Prior reported opinions of the district court in this matter that were the subject of review by the court of appeals appear at 469 F. Supp. 154 (1979), and reproduced in the Appendix commencing at App. 197; and at 657 F. Supp. 573 (1985), and reproduced in the Appendix commencing at App. 110. An unreported opinion of the district court

reviewed by the court of appeals in its opinion reported at 969 F.2d 848 (1992) is reproduced in the Appendix commencing at App. 67.

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## JURISDICTION

The judgment of the court of appeals was entered on August 6, 1996, and rehearing was denied on February 21, 1997. App. 228. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

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## FEDERAL LAW INVOLVED

This petition presents an issue of federal common law. App. 7-12.

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## STATEMENT

### A. Factual Background

This case does not involve any taxes actually paid by respondent Crow Tribe to petitioners. Instead, it involves taxes paid to petitioners by Westmoreland Resources, Inc., a nontribal enterprise, which mined coal on various properties it leased from respondent Crow Tribe. Specifically at issue are \$46.8 million in coal severance taxes that Westmoreland paid to the State between 1976 and 1982 pursuant to 1975 Montana Laws chapter 525, §§ 1-8 (codified as amended at Mont. Code Ann. §§ 15-35-101 to -205 (1995)), and \$11.4 million in gross proceeds taxes that Westmoreland paid to Big Horn County between

1975 and 1987 pursuant to 1975 Montana Laws chapter 525 §§ 9-12 (codified as amended at Mont. Code Ann. §§ 15-23-701 to -707 (1995)). App. 234-242.

Westmoreland paid all of the taxes at issue without initiating any tax protest under the procedures provided by Montana law. App. 37 (FOF ¶ 60).<sup>1</sup> In 1991, moreover, it entered into a settlement agreement with both Montana and Big Horn County. Under that agreement, Westmoreland dismissed with prejudice a cross claim filed early in this litigation seeking recovery of the taxes it had paid to petitioners and "waived and/or disclaimed any claim of entitlement to a refund of severance and gross proceeds taxes paid to the state and county" during the relevant years. App. 37 (FOF ¶ 61).

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<sup>1</sup> Westmoreland's tax refund remedies differed as to each tax. With respect to the severance tax, the protest procedure for returns due on or before December 31, 1980 was governed by Mont. Code Ann. § 15-1-401 (1979). Under that provision, Westmoreland was required to file a written protest with the Montana Department of Revenue specifying the reasons for the protest and then to initiate a state court action within 60 days. For returns due after December 31, 1980, it was required by Mont. Code Ann. § 15-35-114 (1981) to file with the Department of Revenue a claim seeking a refund within five years of the involved return's filing. With respect to gross proceeds tax payments due before July 1, 1981, Westmoreland was required by Mont. Code Ann. § 15-1-402 (1979) to file a written protest and thereafter to initiate a state district court action for a refund within 90 days of the protest. For gross proceeds tax payments due after July 1, 1981, the administrative and judicial appeal procedures in Mont. Code Ann. §§ 15-1-402, 15-2-301 and -303 to -306 (1981) governed, although Westmoreland alternatively could have challenged its obligation to make those payments by pursuing the declaratory judgment remedy procedure provided under Mont. Code Ann. § 15-1-406 (1981).

Of the \$46.8 million Westmoreland paid in severance taxes, the majority was used for the State's general fund, state equalization aid to public schools, highway improvement, archaeologic preservation, alternative energy research, and the general funds of the counties where coal was mined. App. 23-24 (FOF ¶ 27). The remainder was allocated to three trust funds, the income of which was available for various expenditures. App. 24 (FOF ¶ 28). Approximately \$3.1 million of the gross proceeds taxes were retained by Big Horn County and used for current expenditures, while 91 percent of the remainder, or \$7.6 million, was distributed to two school districts serving county children in accordance with state law. CR 679 at Agreed Facts ¶ AC.

#### B. Proceedings Below

1. *Crow I* and *Crow II*. Respondent Crow Tribe initiated this litigation in 1978 by challenging application of the Montana coal severance tax to coal production within the Crow Indian Reservation and from mineral estates held in trust for the Tribe under a parcel of land known as the ceded strip. The ceded strip is located immediately north of the Reservation's exterior boundaries, and a portion of the Tribe's underlying mineral estate was leased to Westmoreland. The Tribe alleged that these taxes were preempted by the Omnibus Mineral Leasing Act of 1938, 52 Stat. 347 (codified as amended at 25 U.S.C. §§ 396a-396g). App. 230-33. The district court dismissed the Tribe's complaint for failure to state a claim, but the Ninth Circuit reversed. App. 167, 169, 197; *Crow Tribe v. Montana*, 469 F. Supp. 154 (D. Mont. 1979), *rev'd*, 650 F.2d 1104 (9th Cir. 1981), *amended*, 665 F.2d 1390

(9th Cir.) ("*Crow I*"), *cert. denied*, 459 U.S. 916 (1982). Following trial on remand, the district court concluded that the taxes were not preempted, but the Ninth Circuit reversed again and was affirmed by this Court. App. 87, 88, 110; *Crow Tribe v. Montana*, 657 F. Supp. 573 (D. Mont. 1985), *rev'd*, 819 F.2d 895 (9th Cir. 1987) ("*Crow II*"), *aff'd mem.*, 484 U.S. 997 (1988).

2. *Crow III*. Following the court of appeals' decision in *Crow II*, the Tribe filed its fourth amended complaint (App. 252-60) which contained two claims for relief – one in assumpsit for money had and received and one for a constructive trust – seeking recovery of the taxes paid by Westmoreland to Montana and Big Horn County, along with prejudgment interest. Petitioners moved to dismiss the complaint for failure to state a claim, arguing in part that the Tribe, or the United States as its trustee,<sup>2</sup> was not entitled under accepted assumpsit principles to recover taxes which it did not pay. The district court denied petitioners' motion but later certified its order for interlocutory appeal under 28 U.S.C. § 1292(b). App. 61, 67.

The Ninth Circuit initially gave petitioners leave to appeal under § 1292(b) but after the case's submission concluded such leave had been granted improvidently. App. 58; *Crow Tribe v. Montana*, 969 F.2d 848 (9th Cir.

<sup>2</sup> The United States, which had intervened as a plaintiff in 1983 following the first remand, lodged an amended complaint six months after the Tribe had filed its amended complaint. Other than requesting that restitution be paid to it in trust for the Tribe and asserting jurisdiction under 28 U.S.C. § 1345, the Government's complaint was substantively identical to the Tribe's. App. 243-51.

1992) (per curiam) ("*Crow III*"). It nonetheless issued an opinion discussing briefly the fundamental question whether the Tribe had a legal right to recover taxes it never paid. The panel stated that "a duty inter sese between the interests of the Crow Tribe and the money collected from a third person by Montana's void tax" had "already [been] addressed by this court in [*Crow II*]." App. 59. It then quoted several passages from the *Crow II* opinion which concluded that the taxes had "at least some negative impact" on the Tribe's economic interests by decreasing marketability of Westmoreland's coal and thereby reducing potential royalties to the Tribe. App. 59-60. The court did not explain how the reasoning in its earlier decision on the issue of preemption controlled its decision on the entirely distinct question of whether the Tribe could state a claim for quasi-contractual relief. Nor did it explain why the economic harm the Tribe may have suffered - i.e., a possible reduction in lease income - entitled it to recoup an amount equal to any or all of Westmoreland's tax payments.<sup>3</sup>

3. *Crow IV*. The district court held a six-day trial following the Ninth Circuit's decision in *Crow III*. Much

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<sup>3</sup> *Crow III*'s reliance on *Crow II* was not without a measure of irony. The portion of *Crow II* relied upon cited to footnote 13 of the *Crow I* opinion, but the court in *Crow III* chose to ignore the concluding sentence of that footnote: the *Crow I* panel's statement that, "[a]s to the taxes already paid by Westmoreland, . . . it is true that the Tribe has not paid any of the taxes and is apparently not entitled to any refund if the tax statutes are declared invalid." App. 186 n.13. The panel below, which largely predicated its decisionmaking with respect to the quasi-contract claim on law-of-the-case principles, also failed to address the inconsistency of its reasoning with *Crow I*.

of the evidence was directed to three "equitable facts" that the district court had identified as potentially important in the decision at issue in the *Crow III* interlocutory appeal: (1) "the amount of money collected by the State," (2) "whether the Tribe would have collected similar amounts but for the State tax," and (3) "the amount of money that the State channeled to services enriching the Tribe." App. 84. The district court also had remarked when identifying these factors that "[o]nly upon inspecting the field of countervailing equities can the Court, in fairness and good conscience, impose upon the State of Montana a decree in equity to release coal severance tax funds." *Id.*

The evidence demonstrated, as noted above, that Westmoreland had paid taxes totaling approximately \$58 million to Montana and Big Horn County. With respect to the second factor, the evidence on this issue established, and the district court found, that Westmoreland had no tax obligation to the Tribe during the 1976-82 period, when all of the severance taxes and 63 percent of the gross proceeds taxes were collected, and in any event would not have paid tribal taxes absent the Secretary of the Interior's approval of the underlying taxation code.

More specifically concerning the second factor, the district court found that a tax code adopted by the Tribe in 1976, which had sought to impose a 25 percent severance tax on production of tribally owned coal, had not been approved by the Secretary for application to the ceded strip. App. 31 (FOF ¶ 49). This was due in part to the fact that "the Tribe failed to follow its own constitutional procedures in amending its constitution for imposing the coal tax, and not because Montana had its tax in

place." App. 36-37 (FOF ¶ 59) (emphasis added). The court further found that, in the absence of such an approved tax code, Westmoreland was unable to pass the tax through to its utility customers and therefore "would not have paid coal taxes to the Tribe" regardless of whether it had state tax obligations. App. 35 (FOF ¶ 57). Evidentiary support for the district court's conclusion was extensive and included the fact that the Tribe's and Westmoreland's pleadings referred to the absence of secretarial approval for the tribal tax (CR 2 at ¶¶ 30, 31; CR 40 ¶¶ 30, 31; CR 45 at Ans. ¶ 31; CR 117A at ¶ 34); the observation in *Crow I* that the Tribe's tax was inapplicable to Westmoreland's ceded strip production (App. 192 n.19); the lack of any demand for taxes by the Tribe during the relevant period (CR 679 at Agreed Facts ¶ AA); the Tribe's own legal analysis provided to Westmoreland in 1982 indicating the tax's nonapplicability absent secretarial approval (Defs. Ex. 549 at 3, 18); the testimony of Westmoreland's president and its principal attorney (App. 32-33 (FOF ¶ 54)); and an October 1982 lease amendment under which Westmoreland agreed to pay a "tax" equal to the state taxes less amounts paid to Montana and Big Horn County (App. 31-32 (FOF ¶ 51)).

As to the third equitable consideration, petitioners introduced undisputed evidence that Montana and Big Horn County provide services substantially benefiting the Tribe's members who reside on-reservation. Expert testimony and associated reports analyzing the nature and cost of governmental services thus established, for example, that tribal members have access to the same state services as other residents living on or off the Reservation and that, over an 18-year period between 1975 and

1992, the cost of state services provided members was estimated conservatively at \$79 million. Defs. Ex. 511 at 56. Other evidence showed that tribal members residing within Big Horn County received county and school district services with an estimated cost of \$25.4 million over a 12-year study period between 1975 and 1987. Defs. Ex. 614 at 2. In addition to these reservation-specific services, Montana and Big Horn County also provide essentially all governmental services on the ceded strip, where the coal at issue was mined and whose surface is not part of the Reservation. App. 38 (FOF ¶ 65).

It was in this factual context that the district court rejected the Tribe and United States' claim for restitution of Westmoreland's tax payments. App. 49 (COL ¶ 24). In concluding that quasi-contractual relief was not appropriate, the court recognized that the coal taxes may have had some adverse impact on the Tribe but reasoned that

it does not follow that [petitioners], who received taxes from Westmoreland under what was then an existing lawful obligation, now owe restitution damages to the Tribe in light of the failure of Westmoreland to initiate appropriate proceedings to recover funds. *The opposite result would allow the Tribe and the United States to recover taxes which the actual taxpayer admittedly cannot. The Tribe could have redressed Westmoreland's admission by proceeding against Westmoreland or it could have contracted with Westmoreland to initiate such appropriate action to recover the Montana taxes.*

App. 51 (COL ¶ 28) (emphasis added).

The Ninth Circuit, reflecting remarkable consistency in its hostility to petitioners' positions, reversed and held in a brief per curiam opinion that denial of equitable relief was an abuse of discretion and remanded "for entry of an order directing the State and County to disgorge the improperly collected taxes." App. 12. The court of appeals did not analyze the various issues closely but, as in *Crow III*, concluded that the outcome of the case essentially had been determined by its prior appellate decisions – two of which addressed the issue of preemption and the third of which relied on the first two. App. 7-8.

Most fundamentally, the Ninth Circuit, citing to its decision in *Crow III*, held that the Tribe had stated a claim for equitable relief "*despite the absence of traditional requirements for relief under theories of assumpsit or constructive trust.*" App. 8 (emphasis added). It then added that the Tribe and the United States were entitled to relief "even though there was no privity and even though the Tribe itself had not paid the taxes to the State." *Id.* The court further found misplaced petitioners' reliance on this Court's decision in *United States v. California*, 507 U.S. 746 (1993). In a footnote, as modified in response to petitioners' petition for rehearing, the court of appeals determined *California* to be "inapplicable" because in that case this Court had found that

California could only be liable if it were somehow responsible for the wrongful act of a third party and there was no finding that California had wrongfully or illegally collected taxes. In this case, however, the illegality of Montana's taxes was established in *Crow I* and *Crow II*; Montana need not be held responsible for

another party's wrongdoing for liability to attach.

*California* involved an entirely different factual situation: a claim of restitution by the Government where the Government had voluntarily agreed to reimburse a contractor subject to a state tax. The Government, unlike the Tribe, was "in no better position than as a subrogee of its contractor," . . . and the Supreme Court held that "the Government cannot use the existence of an obligation to indemnify [a contractor] to create a federal cause of action for money had and received to recover state taxes paid by [the contractor]."

App. 8 n.2 & 16 (citations omitted). Having held that the Tribe could state a claim for equitable relief notwithstanding the absence of the traditional elements necessary for such relief, the Ninth Circuit proceeded, without articulating any standards, to reverse each of the district court's findings concerning the various equitable factors it considered.

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#### REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision constitutes an extraordinary and unprincipled expansion of quasi-contractual relief with potentially broad implications in an area where this Court has devoted substantial attention over the last 25 years – the authority of States to tax in Indian country. It is extraordinary because no court – except the Ninth Circuit here – has ever held that third parties such as respondents have a right to recoup tax monies paid to

a governmental entity when the taxpayer itself admittedly has no right to recovery. The decision is unprincipled because it is directly contrary to this Court's holding in *United States v. California*, 507 U.S. 746 (1993), as well as the decision of the Tenth Circuit in *Ute Indian Tribe v. State Tax Commission*, 574 F.2d 1007 (10th Cir.), cert. denied, 439 U.S. 965 (1978), which recognized that the common law action in assumpsit for money had and received is a means for taxpayers, not third parties, to recover unlawful exactions.

The Ninth Circuit's decision has far-reaching practical consequences. First, the monetary stakes here are enormous, and no reason exists to believe they will be any less so in future cases involving other States. The court of appeals ordered petitioners to "disgorge" \$58.2 million and additionally ordered the district court to adjudicate the respondents' request for prejudgment interest, which respondents claimed as \$257.3 million during the 1994 trial. These are remarkable sums, particularly when most (in the case of Montana) or all (in the case of Big Horn County) of the tax payments have long since been expended to provide government services, including a full range of services to tribal members whether residing on or off the Reservation. Second, leaving the decision unreviewed invites similar challenges, with the possibility of protracted and, if the court of appeals' analytical approach is adopted, virtually standardless adjudication of liability. That result runs counter to this Court's efforts to formulate concrete rules governing the state taxation authority in Indian country and thereby minimize litigation over such issues.

# I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S HOLDING IN CALIFORNIA.

The Tribe and the United States pressed assumpsit and constructive trust causes of action below. These claims at bottom were requests for different remedies based upon establishing a quasi-contractual right of restitution to Westmoreland's severance and gross proceeds tax payments.<sup>4</sup> The Ninth Circuit's holding, originally in *Crow III* and subsequently in *Crow IV*, that the Crow Tribe could pursue its claims despite the fact that Westmoreland paid the taxes pursuant to a state statute and had no legal claim against petitioners conflicts directly with this Court's decision in *United States v. California*, 507 U.S. 746 (1993).

A. In *California*, the United States sued California claiming that it was entitled, based on the federal common law cause of action for money had and received, to recover taxes alleged to have been assessed improperly under state law against a government contractor – Williams Brothers Engineering Company ("WBEC"). 507 U.S. at 748. WBEC paid the taxes under protest, using funds provided by the Government pursuant to a contractual agreement. *Id.* at 749. It subsequently settled the dispute

<sup>4</sup> *Restatement of Restitution* § 160, cmt. a (1971) ("a quasi-contractual obligation and a constructive trust closely resemble each other, the chief difference being that the plaintiff in bringing an action to enforce a quasi-contractual obligation seeks to obtain a judgment imposing a merely personal liability upon the defendant to pay a sum of money, whereas the plaintiff in bringing a suit to enforce a constructive trust seeks to recover specific property"); 1 George E. Palmer, *Law of Restitution* § 1.3, at 13 (1978) ("Palmer") (same).

with the State for \$3 million out of \$14 million in taxes paid. *Id.* The United States then sought the remainder on the theory that its obligation to reimburse WBEC created a quasi-contractual relationship with California so as to allow recovery.

This Court unanimously rejected the Government's position. It held that "[i]n this case . . . the taxpayer – WBEC – has had its day in court and gone home. The Government attempts to recover money it paid in reimbursement for state tax assessments against the contractor, even though the contractor already has challenged the assessment and accepted a resolution of its claims." 507 U.S. at 752. As a result, it concluded that "[e]ven assuming that federal courts may entertain a common law action for the recovery of state taxes paid by the Government, . . . a federal action is inappropriate here because the Government is in no better position than as subrogee of its contractor." *Id.* at 752. Or, put another way, even though it was obligated to indemnify WBEC, "the Government [could not] use the existence of [that] obligation . . . to create a federal cause of action for money had and received to recover state taxes paid by WBEC." *Id.* at 754.

In so holding, the Court expressly distinguished a short line of cases in which it had held that a federal common law cause of action for money had and received could be stated. According to this Court, those cases, including *Bayne v. United States*, 93 U.S. 642 (1877), and *Gaines v. Miller*, 111 U.S. 395 (1884), shared two common features. First, in each case, "the rightful owner of the money lost it by way of theft." 507 U.S. at 755. Second, in each case, the rightful owner sued a third party who was

legally responsible for the actions of the one who unlawfully took the money. *Id.*

Neither *Bayne* nor *Gaines* controlled the outcome in *California* because WBEC had not stolen the money it used to pay the taxes and, in any event, California did not have a relationship with WBEC that would make it legally responsible for WBEC's actions. "In fact, California and WBEC had an adverse relationship: that of creditor and debtor." 507 U.S. at 756. In such circumstances, the Court held that it would "not imply a contract in law between California and the Government." *Id.* at 756. And, "without an implied contract, an action for money had and received will not lie against the State." *Id.*<sup>5</sup>

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<sup>5</sup> This Court's decision in *California* was based on a straightforward application of the common law. Claims in quasi-contract for money had and received were recognized at common law by this and other courts as a means for recovering illegal taxes paid under duress and protest. See, e.g., *Stone v. White*, 301 U.S. 532, 534 (1937); *Saltonstall v. Birtwell*, 164 U.S. 54, 71 (1896); *City of Philadelphia v. Collector*, 72 U.S. 720, 731-32 (1866); see generally II Palmer § 9.16; Thomas M. Cooley, *Law of Taxation* 1487-90 (Albert Poole Jacobs ed., 1903). Recovery under this theory ordinarily was limited to the statutorily prescribed taxpayer or "payor" (*Restatement* § 75). An exception to the normal rule was developed in some states, including Montana, when a taxpayer mistakenly paid taxes to one taxing jurisdiction under a statute requiring them to be paid to another taxing jurisdiction; in that instance, the entity entitled to the taxes under the statute could seek recovery against the entity which mistakenly received them. *Valley County v. Thomas*, 97 P.2d 345, 366 (Mont. 1939). As the district court correctly found, that exception had no application here. App. 49-50 (COL ¶ 25).

B. The Ninth Circuit's attempt to distinguish – and more realistically to evade – *California* betrayed a fundamental misunderstanding of that decision. As discussed, the panel interpreted *California* to turn not on whether the Government could state a claim in quasi-contract but rather on whether California had somehow acted improperly. The panel then reasoned that, by contrast, "the illegality of Montana's taxes was established in *Crow I* and *Crow II*; Montana need not be held responsible for another party's wrongdoing for liability to attach." 98 F.3d at 1195 n.2. The Ninth Circuit also held that *California* involved an "entirely different" set of facts. Without any explanation, it stated that "unlike the Tribe" in this case, the United States in *California* was in no better position than a subrogee of the taxpayer. *Id.*

Neither of these "distinctions" makes any difference to the proper legal analysis in this case. *California* did not turn on whether the State had acted improperly; instead, it turned on the rule that the Government had no claim in quasi-contract to recover taxes paid by a third party which had waived its right to recoupment. Put another way, the fact that the Government had no claim in quasi-contract had nothing to do with whether the taxes at issue were lawfully collected from the actual taxpayer. Respondents – both third parties to the taxpayer-State relationship here – are situated no differently than the Government was in *California*: without a claim in quasi-contract for recoupment of taxes assessed upon and paid by another. See App. 178-80 (conclusion in *Crow I* that legal incidence of tax fell on Westmoreland, not the Tribe).

Second, the Ninth Circuit's suggestion that the respondents have a *better* claim to recoupment in this case than the United States did in *California* – where the Government predicated its quasi-contract claim squarely on the ground that WBEC had used federal funds to pay the taxes (Brief for United States at 16-17, *United States v. California, supra*) – makes no sense. Precisely the opposite is true. Here, unlike in *California*, respondents had *no* obligation to reimburse Westmoreland for the taxes it paid. They are consequently in no better position to recoup the taxes paid – and in fact are in a substantially worse position – than was the Government in *California*. Indeed, it is plain that, even under the legal theory advanced unsuccessfully by the United States in *California*, no entitlement to quasi-contractual relief is available in this matter given the absence of reimbursement.

Finally, even if the Ninth Circuit's footnote concerning *California* is viewed as an inartful effort to fit this case into the *Bayne - Gaines* exception to the *California* rule, the present matter still cannot be distinguished from *California*. There neither was, nor could have been, any suggestion that Westmoreland took money unlawfully from the Tribe to pay the taxes, since Westmoreland used its own funds to discharge the tax obligations. Moreover, even had tribal funds been used to pay the taxes, the relationship between Westmoreland and petitioners was still adversarial. It was, in other words, the very same creditor-debtor relationship that this Court recognized as "adverse" in *California*.

In short, the material facts here are substantively indistinguishable from those in *California*: this case, like *California*, involves an effort by third parties to recoup

taxes paid by a taxpayer who stood in an adverse relationship to the taxing entity but who eventually forfeited any claim to the taxes sought by the third party. As such, the court of appeals was obligated to follow this Court's decision in *California*, but it did not. The decision leaves States within the Ninth Circuit subject to one version of the law, while the remainder of the country is subject to another founded on fidelity to *California*. This Court should grant certiorari to resolve that unacceptable situation.

## II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THE TENTH CIRCUIT'S DECISION IN *UTE INDIAN TRIBE v. STATE TAX COMMISSION*.

The Ninth's Circuit's decision also conflicts with the holding of the Tenth Circuit in *Ute Indian Tribe v. State Tax Commission*, 574 F.2d 1007 (10th Cir.), *cert. denied*, 439 U.S. 965 (1978). The *Ute* case involved a tribe's claim that a Utah sales tax imposed on consumers but collected by a tribal retailer for remittance to the State was preempted. In addition to prospective injunctive relief, the Tribe requested return of sales taxes it previously had collected and remitted to the State.

The court of appeals held the tax preempted insofar as it was imposed on Indians. 574 F.2d at 1009. Nonetheless, although it granted certain prospective relief, the court rejected the tribe's claim for recoupment in its entirety, reasoning that because "these funds now in the hands of the State were paid by buyers of the goods and not by the sellers[,] . . . [i]f anyone can seek recovery or refund, it is these *buyers*." *Id.* (emphasis added). The

Tenth Circuit accordingly recognized that the Ute Tribe could not recover the taxes at issue since it was not the taxpayer. This result cannot be reconciled with that below, where the Crow Tribe did not possess even the status of a collector and remitter of taxes paid by another. This Court should grant certiorari to resolve the conflict between these two contradictory holdings.

## III. THE NINTH CIRCUIT'S DECISION HAS EXCEPTIONAL LIABILITY CONSEQUENCES NOT ONLY FOR THE PETITIONERS BUT ALSO FOR ALL STATES THAT TAX TRANSACTIONS IN INDIAN COUNTRY.

The Ninth Circuit's decision additionally warrants review because it has exceptional public importance. The court of appeals' reasoning carries with it the possibility of enormous liability not only for petitioners but also, at the very least, for other States or local governments within the Ninth Circuit. Even though the only damages the Tribe conceivably could have suffered relate to the diminished royalty payments it may have received from Westmoreland, the Tribe and the United States sought at the 1994 trial a total of \$315.5 million in tax payments and prejudgment interest on those payments. Their claim undoubtedly has grown with the passage of time and accrual of additional interest. The enormous fiscal impact that such a judgment would have on the operations – and citizens – of Montana and Big Horn County is self-evident. The court of appeals' reasoning, moreover, is not restricted to this case; it provides a blueprint for tribes and the United States to seek similar relief against other States and their political subdivisions. Indeed, the stakes

are sufficiently high that similar claims are a virtual certainty.

The Ninth Circuit's decision is especially dangerous because it is standardless. Under its approach, if a state statute is successfully challenged on preemption grounds by a tribe, the State and its political subdivisions may be held liable to the tribe for taxes paid by third parties based on nothing more than a federal court's perception of competing equities. As this case makes clear, that standard is, in fact, no standard at all, since different federal judges may form very different conclusions about the "equities" of the case.

Such a result is untenable. This Court has long recognized the need for reasonably certain outcome-determinative rules where state Indian country taxation authority is at stake. In *County of Yakima v. Confederated Tribe & Bands of Yakima Indian Nation*, 502 U.S. 251 (1992), for example, it rejected the court of appeals' adoption of an ad hoc approach for determining the taxability of tribal fee-owned property, remarking that "[i]f the Ninth Circuit's . . . test were the law, litigation would surely engulf the states' annual assessment and taxation process, with the validity of each levy dependent upon a multiplicity of factors that vary from year to year, and from parcel to parcel." *Id.* at 267-68. The Court reiterated this point several years later in *Oklahoma Tax Commission v. Chickasaw Nation*, 115 S. Ct. 2214 (1995), in finding unpersuasive a State's suggestion that Indian country preemption analysis should focus not on the legal incidence of a tax but on the extent to which tribal retailers actually bore the tax's economic burden:

[O]ur focus on a tax's legal incidence accommodates the reality that tax administration requires predictability. The factors that would enter into an inquiry of the kind the State urges are daunting. If we were to make "economic reality" our guide, we might be obligated to consider, for example, how completely retailers can pass along tax increases without sacrificing sales volume – a complicated matter dependent on the characteristics of the market for the relevant product.

*Id.* at 2221. The court of appeals' approach invites just such a complex, case-by-case weighing of poorly defined considerations by district courts that, as demonstrated by its decision, would be subject to wholesale revision by appellate courts with a different view of how the equities should be assessed.

The court of appeals' decision thus not only imposes a entirely new form of liability on petitioners, and presumably on States in general, but also establishes an essentially standardless analysis through which liability is to be determined, thereby ensuring high stakes litigation of the kind found here. The untoward practical consequences of the result below are compounded, of course, by the Ninth Circuit's convoluted effort to evade the clearly controlling nature of this Court's decision in *California* and by the conflict now existing with the Tenth Circuit's opinion in *Ute Indian Tribe*. Because the court of appeals' decision has fiscally devastating consequences, disregards *California* and is irreconcilable with *Ute Indian Tribe*, review by this Court is warranted.

### CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

CARTER G. PHILLIPS  
PAUL E. KALB  
C. FREDERICK BECKNER  
SIDLEY & AUSTIN  
1722 Eye Street, N.W.  
Washington, D.C 20006  
(202) 736-8000

JOSEPH P. MAZUREK\*  
Attorney General  
CLAY R. SMITH  
Solicitor  
Justice Building  
P.O. Box 201401  
Helena, MT 59620-1401  
(406) 444-2026

CHRISTINE A. COOKE  
Big Horn County  
Attorney  
Drawer H  
Hardin, MT 59034  
(406) 665-2255

JAMES E. TORSKE  
314 North Custer  
Avenue  
P.O. Drawer F  
Hardin, MT 59034  
(406) 665-1902

*Counsel for Petitioners*

May 1997

\* *Counsel of Record*

### APPENDIX

Opinion of Ninth Circuit Court of Appeals (filed August 6, 1996), reported at 92 F.3d 826 .....	App. 1
Order of Ninth Circuit Court of Appeals (filed October 29, 1996) amending opinion entered August 6, 1996, reported at 98 F.3d 1194 .....	App. 15
Findings of Fact, Conclusions of Law and Judgment of United States District Court (filed November 23, 1994) .....	App. 17
Order of Ninth Circuit Court of Appeals (filed July 23, 1992), reported at 969 F.2d 848 .....	App. 58
Opinion and Order of Certification for Inter- locutory Appeal of United States District Court (filed May 29, 1991) .....	App. 61
Memorandum Opinion and Order of United States District Court (filed December 26, 1990) .....	App. 67
Order of United States Supreme Court (filed January 11, 1988) affirming judgment of Ninth Circuit Court of Appeals entered on June 11, 1987, reported at 484 U.S. 997 ...	App. 87
Opinion of Ninth Circuit Court of Appeals (filed June 11, 1987), reported at 819 F.2d 895 .....	App. 88
Findings of Fact, Conclusions of Law of the United States District Court (filed September 10, 1985), reported at 657 F. Supp. 573 ...	App. 110

App. ii

Order of Ninth Circuit Court of Appeals (filed January 5, 1982) amending opinion entered July 13, 1981, reported at 665 F.2d 1390 .....	App. 167
Opinion of Ninth Circuit Court of Appeals (filed July 13, 1981), reported at 650 F.2d 1104 .....	App. 169
Memorandum Opinion and Order of United States District Court (filed April 3, 1979), reported at 469 F. Supp. 154 .....	App. 197
Order of Ninth Circuit Court of Appeals denying Appellees' Petition for Rehearing with Suggestion for Rehearing En Banc (filed February 21, 1997) .....	App. 228
Omnibus Indian Mineral Leasing Act of 1938, as amended and codified at 25 U.S.C. §§ 396a-396g .....	App. 230
1975 Montana Laws chapter 525, §§ 1-12	App. 234
Plaintiff-Intervenor United States' First Amended Complaint (filed December 26, 1990) .....	App. 243
Plaintiff Crow Tribe's Fourth Amended Com- plaint For Restitution (filed October 11, 1989) .....	App. 252

App. 1

FOR PUBLICATION  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

THE CROW TRIBE OF INDIANS,	)	
<i>Plaintiff-Appellant,</i>	)	No. 95-35093
and	)	D.C. No.
UNITED STATES OF AMERICA,	)	CV-78-00110-BLG
<i>Plaintiff-Intervenor,</i>	)	
v.	)	
STATE OF MONTANA, Director, Ken	)	
Nordtvedt; COUNTY OF BIG HORN;	)	
TREASURER, BIG HORN COUNTY,	)	
MARTHA FLETCHER,	)	
<i>Defendants-Appellees.</i>	)	
THE CROW TRIBE OF INDIANS,	)	
<i>Plaintiff,</i>	)	No. 95-35096
and	)	D.C. No.
UNITED STATES OF AMERICA,	)	CV-78-00110-JDS
<i>Plaintiff-Intervenor-Appellant,</i>	)	OPINION
v.	)	
STATE OF MONTANA, Director, Ken	)	
Nordtvedt; COUNTY OF BIG HORN;	)	
TREASURER, BIG HORN COUNTY,	)	
MARTHA FLETCHER,	)	
<i>Defendants-Appellees.</i>	)	

App. 2

Appeals from the United States District Court  
for the District of Montana

Jack D. Shanstrom, District Judge, Presiding

Argued and Submitted

January 9, 1996 – Seattle, Washington

Filed August 6, 1996

Before: James R. Browning, Eugene A. Wright, and  
William C. Canby, Jr., Circuit Judges.

Per Curiam

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SUMMARY

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**Tax/Government Law/Native Americans**

The court of appeals reversed a district court order and remanded. The court held that denial of equitable relief was an abuse of discretion in a case in which a tribe sought restitution of monies paid to a state and county under unlawful taxes, where nearly all of the equitable considerations advanced in support of the retention of the unlawful taxes by the state were rejected explicitly or rendered irrelevant by the court of appeals' previous decisions.

Appellee the State of Montana imposed severance and gross proceeds taxes on coal produced from appellant the Crow Tribe of Indians' coal deposits. The Tribe, and the United States as its trustee, brought suit challenging Montana's taxes on preemption and tribal sovereignty grounds. The court of appeals, in *Crow I*, held that the complaint stated a cause of action. After trial, the court of appeals held, in *Crow II*, that the Tribe established both

App. 3

that the taxes impermissibly eroded its sovereign authority and that they interfered with the policy of promoting tribal self-government and economic development underlying the Indian Mineral Leasing Act of 1938, were not narrowly tailored to achieve Montana's legitimate interests, and were therefore preempted by the federal statute. The district court awarded the Tribe over \$23 million in severance taxes that the Tribe's coal lessee, Westmoreland Resources, Inc., had paid into the court's registry after 1982.

The Tribe sought restitution of all monies paid to the State and appellee the County of Big Horn under the unlawful taxes since 1975 – approximately \$46 million of severance taxes and \$11 million of gross proceeds taxes – on the theory that Montana had been unjustly enriched at the Tribe's expense. The Tribe also sought damages for interference with its contractual relations with another lessor, Shell Oil Co. The district court denied a motion to dismiss the claim for restitution and certified the order for interlocutory appeal. After initially granting leave to appeal, the court of appeals held that leave was improvidently granted and dismissed the appeal.

After a trial, the district court denied relief, weighing the equities and determining that the Tribe was not entitled to restitution under theories of assumpsit or constructive trust or to damages for interference with contract. The court found that lack of privity between the Tribe and Westmoreland and Westmoreland's failure to pursue its own remedies against the State militated against relief, and that the fact that Westmoreland, and not the Tribe, paid the taxes had a place in determining

restitution damages. The court also weighed in Montana's favor the facts that similar taxes are not always preempted and that the Montana taxes withstood a Commerce Clause challenge. The court relied on the fact that Montana provided general government services to the Tribe as a factor weighing against restitution. The court denied restitution in part because the Tribe could not show it would have collected taxes from Westmoreland if Montana had not taxed the coal. The Tribe appealed.

[1] The district court failed to give appropriate weight to the law of this case as established in three prior appeals. In the process of weighing the equities in favor of and against restitution, the district court in effect reconsidered questions of law already decided by the court of appeals in the prior appeals. Nearly every factor relied upon by the district court to determine that the Tribe was not entitled to relief was either contradicted or made irrelevant by earlier holdings of the court of appeals.

[2] In *Crow III* the court of appeals held that the Tribe stated a claim for equitable relief despite the absence of traditional requirements for relief under theories of assumpsit or constructive trust. By denying relief in part because of lack of privity and the fact that Westmoreland and not the Tribe paid the taxes, the district court in effect reinstated the privity requirement that the court of appeals had already rejected in *Crow III* and ignored the law of the case.

[3] The district court failed to follow the court of appeals' earlier holdings when it considered whether the

State acted with wrongful intent. The district court concluded that the record did not support a conclusion that the taxes "were levied with an unlawful purpose," although the court of appeals had already found that the coal taxes were intentionally and illegitimately levied to appropriate most of the economic rent from Tribal coal on a ceded strip.

[4] The district court improperly minimized the weight to be given the Tribe's interest in raising revenue from its mineral resources. [5] In *Crow II*, the court of appeals held that the only legitimate State interest that could justify taxes on Crow coal was the provision of coal related services.

[6] The court of appeals held in *Crow II* that the Tribe was harmed by the State's enrichment whether or not the Tribe could have imposed its own taxes.

[7] Denial of equitable relief was an abuse of discretion. [8] Remand was warranted for entry of an order directing the State and County to disgorge the improperly collected taxes.

[9] The district court properly concluded that the Tribe failed to show the Montana taxes caused the Tribe to lose its lease with Shell.

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#### COUNSEL

William C. Hugenberg and Robert S. Pelcyger, Fredericks, Pelcyger, Hester & White, Boulder, Colorado, for the plaintiff-appellant.

Clay R. Smith, Assistant Attorney General, Helena, Montana, for the defendants-appellees.

Elizabeth Ann Peterson, United States Department of Justice, Washington, D.C., for the plaintiff-intervenor-appellant.

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### OPINION

#### PER CURIAM:

In 1975, Montana imposed severance and gross proceeds taxes on coal produced from Crow Tribe coal deposits. Mont. Code Ann. §§ 15-35-101 through 205; §§ 15-23-701 through 703. The Tribe, and the United States as its trustee,<sup>1</sup> instituted suit challenging Montana's taxes on preemption and Tribal sovereignty grounds. We held the complaint stated a cause of action. *Crow Tribe of Indians v. State of Montana*, 650 F.2d 1104 (9th Cir. 1981), *as amended*, 665 F.2d 1390 (9th Cir. 1982) ("*Crow I*"). After trial, we held the Tribe had established both that the taxes impermissibly eroded the Tribe's sovereign authority and that they interfered with the policy of promoting tribal self-government and economic development underlying the Indian Mineral Leasing Act of 1938, 25 U.S.C. § 396a-g, were not narrowly tailored to achieve Montana's legitimate interests, and were therefore preempted by the federal statute. *Crow Tribe of Indians v. State of Montana*, 819 F.2d 895 (9th Cir. 1987), *aff'd without opinion*, 484 U.S. 997 (1988) ("*Crow II*").

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<sup>1</sup> Subsequent references to the Tribe include the trustee.

After *Crow II*, the district court awarded the Tribe over \$23,000,000 in severance taxes that the Tribe's coal lessee, Westmoreland Resources, Inc., had paid into the court's registry after 1982. The Tribe then sought restitution of all monies paid to the State and County under the unlawful taxes since 1975 – approximately \$46,000,000 of severance taxes and \$11,000,000 of gross proceeds taxes – on the theory that Montana had been unjustly enriched at the Tribe's expense. The Tribe also sought damages for interference with the Tribe's contractual relations with another lessor, Shell Oil Company. The district court denied the defendant's motion to dismiss the claim for restitution and certified the order for interlocutory appeal. After initially granting leave to appeal, we held that leave was improvidently granted and dismissed the appeal on the ground that the State's contention in opposition to the Tribe's request for relief – that "there must be, if not privity, then a duty *inter sese* between the interests of the Crow Tribe and the money collected from a third person by Montana's void tax" – had already been resolved against the State by *Crow II*. *Crow Tribe of Indians v. State of Montana*, 969 F.2d 848, 848 (9th Cir. 1992) ("*Crow III*"). After trial, the district court denied relief, weighing the equities and determining that the Tribe was not entitled to restitution under theories of assumpsit or constructive trust or to damages for interference with contract.

#### I. Restitution

[1] The district court's thoughtful discussion reflects the care with which it addressed the issue of

restitution. Nonetheless, the court failed to give appropriate weight to the law of this case as established in the three prior appeals. In the process of weighing the equities in favor of and against restitution, the district court in effect reconsidered questions of law already decided by this Court in the prior appeals. Nearly every factor relied upon by the district court to determine that the Tribe was not entitled to relief is either contradicted or made irrelevant by our earlier holdings.

## A.

[2] The district court found that lack of privity between the Tribe and Westmoreland and Westmoreland's failure to pursue its own remedies against the State militated against relief, and that the fact that Westmoreland, rather than the Tribe, paid the taxes "[had] its place in determining restitution damages." However, we held in *Crow III* that the Tribe stated a claim for equitable relief despite the absence of traditional requirements for relief under theories of assumpsit or constructive trust; that is, even though there was no privity and even though the Tribe itself had not paid the taxes to the State. *Crow III*, 969 F.2d at 848-49; see also *Crow II*, 819 F.2d at 899; cf. *FDIC v. British-American Corp.*, 755 F. Supp. 1314, 1324 (E.D.N.C. 1991) (to recover for unjust enrichment plaintiff must show plaintiff conferred benefit on defendant).<sup>2</sup> By

<sup>2</sup> Montana's arguments to the contrary are similarly precluded by *Crow III*. The requirements for equitable relief set out in *United States v. California*, 507 U.S. 746 (1993) are inapplicable. In that case, California could only be liable if it were somehow responsible for the wrongful act of a third party

denying relief in part because of lack of privity and the fact that Westmoreland and not the Tribe had paid the taxes, the district court in effect reinstated the privity requirement we had already rejected in *Crow III* and ignored the law of the case.

## B.

[3] The district court failed to follow our earlier holdings when it considered whether the State acted with wrongful intent. The court weighed in Montana's favor the fact that similar taxes are not always preempted, see *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176 (1989), and that the Montana taxes had withstood a Commerce Clause challenge, see *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981), presumably as indications that Montana could not have known the taxes it imposed on the severance and sale of the Tribe's coal were unlawful. Yet the court ignored direct evidence that the Montana legislature was aware that the taxes were potentially preempted and expected "court decreed settlements" would be required to resolve their legality.<sup>3</sup> The court concluded the record did not support a conclusion that

and there was no finding that California had wrongfully or illegally collected taxes. In this case, however, the illegality of Montana's taxes was established in *Crow I* and *Crow II*; Montana need not be held responsible for another party's wrongdoing for liability to attach.

<sup>3</sup> Despite this foreknowledge, Montana did not place the contested taxes in escrow until well after this suit was underway or take other steps to mitigate any hardship it might face if the taxes were held invalid. Cf. *McKesson Corp. v. Florida Alcohol and Tobacco Div.*, 496 U.S. 18, 45 (1990).

the taxes "were levied with an unlawful purpose," although we had already found the coal taxes were intentionally and illegitimately levied to appropriate most of the economic rent from Tribal coal on the ceded strip. *Crow I*, 650 F.2d at 1113, 1114.

The district court intimated that the taxes were not wrongful at all, since the severance tax withstood a Commerce Clause challenge in *Commonwealth Edison*; the district court found "the principles of *Commonwealth Edison* . . . relevant, although not determinative," even though we had noted in *Crow I* that the preemption inquiry raises "[c]ompletely different considerations" from those involved in *Commonwealth Edison*. *Crow I*, 665 F.2d at 1391. Whether or not the tax discriminates against interstate commerce is hardly relevant to the State's culpability for imposing a tax that impinges on Tribal sovereignty and is preempted by federal law.

## C.

[4] The court improperly minimized the weight to be given the Tribe's interest in raising revenue from its mineral resources. We had stated in *Crow II* that "[c]oal production is vital to the economic development of the Crow Tribe[and] . . . generate[s] funds for essential Tribal service[s]," 819 F.2d at 901 (quotation omitted), and noted that the Tribe's interest in coal tax revenue was particularly significant in view of the federal interest in Tribal economic development and self sufficiency. *Id.* at 898.

[5] The district court relied on the fact that Montana provided general government services to the Tribe as a factor weighing against restitution, but we had held in

*Crow II* that the only legitimate State interest that could justify taxes on Crow coal was the provision of coal related services. *Id.* at 901-902. Moreover, provision of general services could not offset the Tribe's revenue loss because the district court found the State would have provided such services even if the Tribal coal had not been mined.

Even provision of coal-related services should not weigh against restitution in this case since there was uncontroverted evidence that coal-related taxes other than the severance and gross proceeds taxes generated far more income for Montana than Montana spent to support coal mining. Thus, even without the severance and gross proceeds taxes, Montana did not suffer financially because Crow coal was mined. *See id.* at 901.

## D.

[6] The district court denied restitution in part because the Tribe could not show it would have collected taxes from Westmoreland if Montana had not taxed the coal. But we had held in *Crow II* that the Tribe was harmed by the State's enrichment whether or not the Tribe could have imposed its own taxes, because the taxes imposed by Montana had an adverse impact on the Tribe's ability to market its coal, increased the costs of coal production, and reduced the royalty the Tribe could charge, "taking revenue that would otherwise go towards supporting the Tribe and its programs." *Id.* at 899-900, 902-03.

The district court reasoned that Westmoreland would not have paid the taxes to the Tribe from 1975-1982 because the Department of the Interior had not approved

the tribal tax. The court had earlier found that Westmoreland would have paid the tribal tax even without approval because it agreed to do so in its 1982 lease. However, Westmoreland was willing to pay coal taxes to the Tribe as early as 1976, so there was no reason for the court to distinguish between the taxes collected before and after 1982.

## E.

[7] We conclude denial of equitable relief was an abuse of discretion. Nearly all of the equitable considerations advanced in support of the retention of the unlawful taxes by the State were rejected explicitly or rendered irrelevant by this court's previous decisions. The equities in favor of restoring improperly collected revenues to the entity entitled to receive them are strong. Montana levied the unlawful taxes with the illegitimate intent of appropriating most of the economic rent from the Tribe's coal and the State benefitted from its wrong. The legitimate claim of the State on profits from the Tribe's coal is minimal and the Tribe's interest is strong.

[8] We remand for entry of an order directing the State and County to disgorge the improperly collected taxes. The court should also consider the plaintiffs' unresolved request for pre-judgment interest.

## II. Interference with Contract

We held in *Crow II* that Montana's coal taxes "impair[ed] the tribe's ability to negotiate leases with Shell Oil and other coal companies." *Crow II*, 819 F.2d at

903; see also *Cotton Petroleum*, 490 U.S. at 186-87 n.17. On remand, the Tribe sought restitution of monies lost as a result of the State's interference with the Tribe's lease negotiations with Shell. The Tribe alleged the high taxes imposed by the State on the sale and severance of the Tribe's coal made it impossible for the Tribe to renegotiate its 1972 lease with Shell and Shell's would-be customers purchased their requirements from other sources which paid severance and gross proceeds taxes to Montana. The Tribe asked the court to declare a constructive trust on taxes collected by Montana on sales of coal to the lost Shell customers, an amount exceeding \$250,000,000. The district court considered the Tribe's claim but rejected it.

[9] The district court did not err. Whether the Tribe's claim is viewed as a state law tort or a request for equitable relief, the Tribe must show that Montana's taxes on the Tribe's coal caused the breakdown in the Tribe's relationship with Shell.<sup>4</sup> The district court found that although taxes may have impaired the Tribe's ability to lease its coal, they were only one factor in the failure of lease negotiations, and other factors were clearly more

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<sup>4</sup> The Tribe's argument that Montana should bear the burden of proving that the unlawful taxes did *not* cause the harm is unpersuasive. The Supreme Court's statement in *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265 (1946), that the "wrongdoer shall bear the risk of the uncertainty which his own wrong has created" applies only to proof of the amount of damages, and does not dispense with the requirement that the plaintiff establish causation. The Tribe has offered no reason to extend to this area the Supreme Court's analysis of proof of causation in securities cases, set out in *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 381-85 (1970).

influential: the Tribe itself repudiated Shell's 1972 lease before the state taxes were imposed, and in 1976 the Tribe successfully sued to invalidate the lease on the ground that the Department of Interior had approved it without making certain findings required by law. Other evidence showed that Shell officials were concerned about internal conflicts among the Tribe's leaders and disputes as to who had authority to represent the Tribe in negotiations with Shell. The district court properly concluded the Tribe failed to show the Montana taxes caused the Tribe to lose its lease with Shell.

### III.

Whether the Tribe is entitled to attorney's fees under 42 U.S.C. § 1988 as the prevailing party in *Crow II* is not before us. The Tribe raised the issue but the district court did not reach it.

REVERSED and REMANDED.

## FOR PUBLICATION UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

THE CROW TRIBE OF INDIANS,  
*Plaintiff-Appellant,*

and

UNITED STATES OF AMERICA,  
*Plaintiff-Intervenor,*

v.

STATE OF MONTANA, Director, Ken  
Nordtvedt; COUNTY OF BIG HORN;  
TREASURER, BIG HORN COUNTY,  
MARTHA FLETCHER,

*Defendants-Appellees.*

No. 95-35093

D.C. No.  
CV-78-00110-BLG

THE CROW TRIBE OF INDIANS,  
*Plaintiff,*

and

UNITED STATES OF AMERICA,  
*Plaintiff-Intervenor-Appellant,*

v.

STATE OF MONTANA, Director, Ken  
Nordtvedt; COUNTY OF BIG HORN;  
TREASURER, BIG HORN COUNTY,  
MARTHA FLETCHER,

*Defendants-Appellees.*

No. 95-35096

D.C. No.  
CV-78-00110-JDS

ORDER

Filed October 29, 1996

Before: James R. Browning, Eugene A. Wright, and  
William C. Canby, Jr., Circuit Judges.

**ORDER**

The motion to recall the mandate is granted.

The petition for rehearing received on September 18, 1996, is accepted for filing.

The opinion is amended by adding to the end of footnote 2:

Montana also argues in its petition for rehearing that this case presents a weaker case for quasi-contractual relief than *California*, where restitution was denied, because the Tribe did not transfer any resources to the State. But *California* involved an entirely different factual situation: a claim of restitution by the Government where the Government had *voluntarily* agreed to reimburse a contractor subject to a state tax. The Government, unlike the Tribe, was "in no better position than as a subrogee of its contractor," *id.* at 1788, and the Supreme Court held that "the Government cannot use the existence of an obligation to indemnify [a contractor] to create a federal cause of action for money had and received to recover state taxes paid by [the contractor]." *Id.* at 1789.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
BILLINGS DIVISION

THE CROW TRIBE OF	)	Cause No.
INDIANS,	)	CV 78-110-BLG-JDS
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
UNITED STATES OF	)	
AMERICA,	)	
	)	FINDINGS OF FACT,
Plaintiff-Intervenor,	)	CONCLUSIONS OF
	)	LAW AND
vs.	)	JUDGMENT
	)	*****
STATE OF MONTANA;	)	
MICHAEL J. ROBINSON,	)	
Director, Montana Department	)	(Filed
of Revenue; BIG HORN	)	Nov. 23, 1994)
COUNTY, MONTANA;	)	
MARTHA FLETCHER,	)	
Treasurer, Big Horn County,	)	
Montana,	)	
	)	
Defendants.	)	

**I.****FINDINGS OF FACT****PARTIES**

1. Plaintiff Crow Tribe of Indians (Tribe) is a sovereign American Indian tribe, with a governing body, the Crow Tribal Council, duly recognized by the United States Secretary of the Interior as the governing body of the Crow Indian Reservation.

2. Plaintiff-intervenor United States holds in trust, and the Tribe is the beneficial owner of, large amounts of coal resources underlying the Crow Indian Reservation and the Ceded Strip. The United States supervises the development of the Tribe's mineral resources through the Department of Interior and the Bureau of Indian Affairs.

3. Defendant State of Montana is a sovereign state of the Union, admitted pursuant to the **Enabling Act** of February 22, 1889. 22 Stat. 676.

4. Defendant Michael J. Robinson is Director of the Montana Department of Revenue and, as such, is charged under Montana law with the enforcement and collection of the Montana Coal Severance Tax. M.C.A. §§ 15-35-101 - 205 (1993). He is sued in his official capacity.

5. Defendant Big Horn County, Montana is a political subdivision of Montana. Most of the Crow Indian Reservation and the Tribe's coal resources, including Westmoreland Resources, Inc.'s (Westmoreland) Absaloka Mine, are encompassed within the exterior boundaries of Big Horn County.

6. Defendant Martha Fletcher is the Treasurer of Big Horn County. She is charged under Montana law with the enforcement and [sic] collection of the Montana Gross Proceeds Tax, M.C.A. §§ 15-23-701 - 703 (1993). She is sued in her official capacity.

#### PROCEDURAL AND FACTUAL OVERVIEW

7. Vast deposits of coal underlie both the Crow Indian Reservation proper and the adjacent area known as the Ceded Strip. The Ceded Strip consists of about

1,137,500 acres originally part of the reservation. The Tribe ceded its interest in the surface estate of this area to the United States in 1904 pursuant to the Act of April 27, 1904, Chapter 1624, 33 Stat. 352, in order to open the area to non-Indian entry and settlement. Although surface interests were thereafter conveyed to non-Indians, rights to the underlying minerals are held by the United States government in trust for the Tribe.

8. To date, only Westmoreland has actually mined coal under leases with the Tribe. Westmoreland's facility is known as the Absaloka Mine.

9. In 1975, Montana enacted statutes imposing a severance tax and a gross proceeds tax on coal produced in the state. M.C.A. §§ 15-35-101 - 111 and 15-23-701 - 704. Pursuant to these statutes, Westmoreland began paying Montana's severance and gross proceeds taxes in 1975.

10. In January of 1976, the Tribe enacted its own legislation imposing a severance tax of 25 percent on the contract value of coal mined on the reservation.

11. The Tribe, in 1978, filed this lawsuit seeking a declaration that the Montana taxes were preempted from application to coal production on the Crow Indian Reservation and the Ceded Strip.

12. The United States intervened in support of the Tribe's claims to protect its interests as a trustee of the coal upon which the taxes were levied. Westmoreland, the operator of the Absaloka Mine, located on the Ceded Strip, and a party to coal lease arrangements with the Tribe, was also granted leave to intervene as a defendant. In that capacity, Westmoreland counterclaimed against

the Tribe for a declaratory judgment that the Ceded Strip surface and subsurface were outside the reservation and the Tribe lacked power to tax mining activities there. Westmoreland also cross-claimed against the state and county defendants, seeking a declaration that the severance and gross proceeds taxes were preempted with respect to the Ceded Strip mining activities under its lease with the Tribe. It also sought corresponding injunctive relief.

13. This Court dismissed the second amended complaint in April of 1979 for failure to state a claim. *Crow Tribe v. Montana*, 469 F.Supp. 154 (D. Mont. 1979). On appeal, this judgment was reversed and the matter remanded for further proceedings. *Crow Tribe v. Montana*, 650 F.2d 1104 (9th Cir. 1981), *amended* 665 F.2d 1390 (*Crow I*), *cert. denied* 459 U.S. 916 (1982).

14. In 1982, the Tribe enacted a severance tax for coal mined on the Ceded Strip. The Department of Interior did not approve this tax in light of questions over the Tribe's authority to tax such activities on the Ceded Strip.

15. Westmoreland paid the severance and gross proceeds taxes to Montana and Big Horn County between 1975 and September of 1982. The Tribe and Westmoreland, in 1982, moved to enjoin the collection of the state taxes and allow Westmoreland to pay the equivalent of the taxes into this Court's registry pending resolution of the issue as to whether Montana's taxes were valid. This Court eventually granted this motion.

16. In November of 1982, a third amended complaint was filed in this matter, seeking, in addition to declaratory and injunctive relief, restitution of illegally

collected taxes and imposition of a constructive trust on the amount of these taxes for the benefit of the Tribe. Westmoreland, for its part, sought recovery of state taxes paid prior to September 29, 1982, the effective date of an amended lease with the Tribe.

17. Trial was held in January of 1984. This Court entered findings of fact and conclusions of law, together with a judgment for defendants, in September of 1985. *Crow Tribe v. Montana*, 657 F.Supp. 573 (D. Mont. 1985). This Court concluded that the Montana coal severance and gross proceeds taxes were valid as applied to the production of coal held by the United States in trust for the Tribe on the Ceded Strip. This ruling made Tribe's resolution of the restitution claims concerning taxes paid by Westmoreland between 1975 and 1982 unnecessary.

18. In June of 1987, the Court of Appeals reversed this Court's judgment and ruled that Montana and Big Horn County's taxes are preempted by federal law and policies, and void for interfering with tribal self-government. *Crow Tribe v. Montana*, 819 F.2d 895 (9th Cir. 1987) (*Crow II*). The Supreme Court summarily affirmed this decision in January of 1988. *Montana v. Crow Tribe*, 484 U.S. 997 (1988) (*per curiam*).

19. In October of 1989, the Tribe filed its fourth amended complaint for restitution, seeking a judgment equal to all severance taxes paid between 1975 and 1982, and all gross proceeds taxes paid between 1975 and 1988, together with the interest thereon from the dates paid.

20. Defendants moved for summary judgment, which was denied in December of 1990. The United States

was authorized to file a first amended complaint substantively identical to the Tribe's fourth amended complaint.

21. Defendants requested leave to pursue an interlocutory appeal. This Court certified for interlocutory appeal its denial of defendants' motion to dismiss for failure to state a claim upon which relief can be granted. The Court of Appeals granted permission for the appeal on July 17, 1991, but then determined that said permission was improvidently granted and dismissed the appeal. *Crow Tribe v. Montana*, 969 F.2d 848 (9th Cir. 1992) (per curiam) (*Crow III*).

22. The parties have stipulated to Westmoreland's dismissal as a defendant and to its counterclaim against the Tribe and cross-claim against the defendants.

23. Plaintiffs assert that the Montana taxes have unjustly enriched Montana at the expense of the Tribe in two ways. The first is that the severance taxes in the amount of 46.8 million dollars paid to Montana between July 1, 1975 and June 30, 1982, and the gross proceeds taxes of 11.4 million dollars paid to Big Horn County between 1975 and 1987, were illegally collected and should be awarded to the United States in trust for the Tribe, with interest. The second is that by imposing taxes on Crow coal, Montana unlawfully interfered with the Tribe's business and contractual relationship with Shell Oil Company, resulting in lost revenues to the Tribe and increased revenues for Montana.

24. Trial was held before this Court on April 18 - 20 and May 2 - 4, 1994. The issues and evidence presented at trial were framed by this Court's Memorandum, Opinion and Order of December 26, 1990. As to the plaintiff's

equitable restitution claim, I found, in the 1990 Opinion, there is a question of fact where the equities lie in this case and I set forth equitable considerations important for me to consider. These include the amount of money collected by Montana and Big Horn County, whether the Tribe would have collected similar amounts but for the state and county taxes, and the cost of the state and county services channeled to tribal members. Evidence was presented on these issues at trial. The parties also presented evidence concerning the economic needs of the Tribe and statistical analysis on the effects of the state taxes on both Westmoreland's production and the ability of the Tribe to market its coal resources.

#### HISTORY AND ALLOCATION OF THE MONTANA TAXES

25. The Montana Coal Severance Tax is imposed on each ton of coal produced in the state with no exceptions for coal owned by Indian tribes. The tax applied to production occurring after June 30, 1975.

26. During consideration of the coal tax legislation, representatives of the Tribe appeared before the Montana legislature and protested imposition of taxes on Crow coal. The Tribe suggested to the legislature that coal producers receive a credit against state taxes for coal taxes paid to Indian tribes. This proposal was not adopted.

27. A portion of Montana's severance tax payments for coal production between July 1, 1975 and December 1, 1983 was allocated for current expenditures. Among other things, severance tax revenues have been used for

the state's general fund, state equalization aid to public schools, coal-area highway improvements, archeological preservation, various cultural projects, alternative energy research, general funds of the counties where the coal is mined, county land planning, and for a sinking fund servicing renewable resource development bond accounts.

28. A portion of the Montana Coal Severance Tax payments was allocated to three trust funds, whose corpus was unavailable for current expenditure during that period, but whose income and interest were available for expenditure. These were the education trust fund; Fish, Wildlife & Parks - Art Council trust fund; and the coal severance tax trust fund.

29. For the period between July 1, 1975 and December 31, 1982, Westmoreland paid severance taxes to Montana with respect to coal held in trust for the Tribe by the United States in the following amounts (by fiscal year) and with the following allocations to the trust funds identified above (by fiscal year):

<u>Year</u>	<u>Tax Amount</u>	<u>Coal Trust</u>	<u>Educ. Trust</u>	<u>FWP Trust</u>
1976	\$ 5,282,763.01	\$	\$ 528,276.30	\$ 66,034.54
1977	5,834,899.75		583,489.98	72,936.25
1978	6,720,489.48	1,680,122.37	504,036.71	63,004.59
1979	6,987,988.94	1,746,997.24	524,099.17	65,512.40
1980	5,778,393.90	2,046,023.88	236,562.19	59,140.69
1981	5,852,067.73	2,926,033.87	585,206.77	146,301.69
1982	7,714,644.08	3,857,322.04	771,464.41	192,866.10
1983	2,639,781.65	1,319,890.83	263,978.17	65,944.54
	<u>\$46,811,028.54</u>	<u>\$13,576,390.23</u>	<u>\$3,997,113.70</u>	<u>\$731,790.65</u>

30. The Constitutional trust fund contains Coal Severance Tax monies paid by Montana producers. The principal of the fund may be appropriated only pursuant to a three-fourths vote of the Montana legislature. However, the legislature may appropriate, and had appropriated, the interest and income earned by the fund. As of June 30, 1993, the book value of the Constitutional trust fund was \$512,017,571.00.

31. The rate of Montana severance taxes vary depending on factors such as the time the coal was produced, its heating quality, and whether it was extracted through surface or underground mining. During the period between July 1, 1975 and June 30, 1982, the coal mined by Westmoreland was taxed at a rate of 30 percent.

32. Since 1985, the Montana legislature has enacted production incentive credits and incrementally reduced the amount of the severance tax. The current tax rate is 15 percent of the contract sales price. The evidence indicates that the motivation for altering the coal tax structure was to reduce producers' costs and improve Montana's competitive place in the coal production market.

33. The gross proceeds coal tax is imposed on each person engaged in mining coal, with no exceptions for coal mined by Indian tribes. Each person mining coal must file with the State Department of Revenue an annual report that must include, inter alia, a statement of the number of tons of coal extracted, treated, and sold from the mine during the taxable period, and the gross yield or value in dollars and cents derived from the contract sales price. The Department of Revenue transmit the valuation of the gross proceeds of the mine to the

county assessor of each county in which the coal mines are located. The county assessor then enters the value on an assessment roll, and transmits a tax assessment to the county treasurer, who collects the taxes due from the coal operator.

34. As enacted in 1975, the amount of the gross proceeds tax was equal to the number of mills levied for general property tax purposes by the county where the production occurred, multiplied by the contract sales price of the production occurring during the particular fiscal year, i.e., State of Montana, school districts, cemetery districts. The tax rate varied from time to time and from county to county, but added roughly another 5 percent to the coal producer's tax assessments on an annual basis. The gross proceeds tax became effective with respect to production occurring after June 30, 1975. In 1989, the Montana legislature modified the gross proceeds tax rate to 5 percent of the contract sales price for production occurring after June 30, 1989.

35. For the period between July 1, 1975 and December 31, 1987, Westmoreland paid gross proceeds taxes to Big Horn County with respect to coal held in trust for the Tribe by the United States in the following amounts by calendar year:

<u>Year</u>	<u>Tax Amount</u>
1975	\$ 124,227.41
1976	787,849.87
1977	919,469.69
1978	1,076,494.88
1979	1,153,727.54
1980	1,205,139.87

1981	863,312.12
1982	1,086,733.89
1983	1,422,458.46
1984	1,026,286.10
1985	871,323.90
1986	892,090.63
Total	\$11,429,114.26

### EFFECTS OF THE STATE COAL TAXES

36. According to the 1990 census, the unemployment rate for Native Americans on the Crow Indian Reservation was 44 percent, as compared to 6 percent for non-Indians in Montana, and 3.3 percent for non-Indians in Big Horn County. Per capita annual income for Native Americans on the Crow Indian Reservation was \$4,243.00, while non-Indians in Big Horn County earned \$10,717.00 per year on a per capita basis. From 1979 to 1989, per capita income measured on a constant dollar basis increased by 17 percent for non-Indians in Big Horn County, while real per capita income of Native Americans in Big Horn County fell by 11 percent over the same period. Fifty percent of the Native Americans on the Crow Indian Reservation are living in poverty, as compared to 13 percent of the non-Indians living in Big Horn County. From 1980 to 1990, the percentage of Native Americans in Big Horn County living below the poverty line increased from 32 percent to 53 percent.

37. This Court, in its findings after the 1984 trial, stated:

- (a) There are enormous unmet needs on the Crow Indian Reservation for additional

revenues to fund essential government programs and services for the Crow people in the areas of housing, health, employment, land acquisition, law enforcement, welfare, and education. *Crow Tribe v. Montana*, 657 F.Supp. at 584.

- (b) Revenues gained from the development of tribally-owned coal reserves, through taxation, royalty collection, or by other legally-sanctioned means, could significantly assist the Tribe in developing a more effective tribal government and a stronger economic base. *Id.*

38. The Court of Appeals has made the following findings:

- (a) It appears that Montana intended, to some extent, to use its coal taxes to profit from the Tribe's coal resources. *Crow II*, 819 F.2d at 902.
- (b) Montana's coal taxes increased the costs of production by Westmoreland, reducing in turn the royalty that could be paid to the Tribe. *Id.*, at 899-900.
- (c) Montana's taxes forced coal producers to charge higher prices, reducing the demand for Montana coal and resulting in fewer sales for the producers and fewer royalties to the Tribe. *Id.*
- (d) By taking revenue that would otherwise go toward supporting the Tribe and its programs, and by limiting the Tribe's ability to regulate the development of coal resources, Montana's coal taxes interfered with the overriding objections of Congress to

encourage tribal self-government and economic development. *Id.*, at 902-903.

- (e) Montana's coal taxes affected tribal revenues by interfering with the Tribe's coal leasing efforts in that it was difficult for the Tribe to find a lessee. *Id.*, at 903.
- (f) Montana's coal taxes interfered with tribal economic development and autonomy. *Id.*

39. At trial, defendants presented additional evidence to that presented at the 1984 trial on the issue of the impact of Montana's coal taxes on Westmoreland's production.

40. Joe Presley, President of Westmoreland Resources, testified that he could not identify any utility contracts lost during the relevant time period due to Montana's coal taxes. He did state that certain customers did exercise the payment option under their contracts rather than continuing to receive coal and that the Montana coal taxes were probably a factor, but not the sole factor, in these decisions. He identified demand, alternative sources, and transportation as other factors.

41. Defendants' economic expert, Stephen Michelson, testified at trial. Michelson conducted a study of the impact of the Montana coal taxes on the sale of Montana coal. He was critical of the NERA report on this issue. The NERA report was presented as evidence at the 1984 trial and cited by the Court of Appeals in *Crow II*. Specifically, Michelson criticized NERA's conclusions that the Montana taxes regulated coal production. Michelson identified no negative impact from the taxes on long-term

contracts for coal, but some effect on spot-market purchases.

42. Mark Berkman, an economist employed by NERA, also testified at trial on the coal tax impact issue. He also testified at the 1984 trial. Berkman defended the NERA report and its methodology. He identified as the one clear constant in explaining the disparity between Wyoming and Montana's coal production growth to be the difference in tax rates. He found Michelson's analysis flawed in failing to establish a cause for the divergent growth paths of Wyoming and Montana coal production.

43. After considering the conflicting expert testimony at trial on this issue, I make no findings in addition to those stated on this issue by the Court of Appeals.

#### WESTMORELAND AND THE TAXES

44. The Tribe and Westmoreland entered into their original lease as to the Ceded Strip coal production in June of 1972. After Westmoreland executed the 1972 lease, it entered into contracts with four midwest utility companies. These contracts allowed it to pass valid taxes through to the utilities. Westmoreland construed these contractual provisions as precluding payment of tribal taxes unless pursuant to an existing tribal tax ordinance approved by the Department of Interior.

45. The Tribe and Westmoreland renegotiated their lease in November of 1974. The amended lease, which was accompanied by a settlement agreement, provided for increased payments and royalties to the Tribe.

According to Westmoreland's Joe Presley, it was the highest coal production royalty in the nation.

46. At the time of the amended lease in 1974, Westmoreland did not anticipate taxation from the Tribe and considered the increased payment and royalty to be the final benefits paid to the Tribe.

47. After the amended lease was executed, the Tribe adopted its 1976 tax code, imposing a severance tax on coal mining within the boundaries of the Crow Indian Reservation, which were defined as including the Ceded Strip.

48. Westmoreland opposed the Department of Interior's approval of the tax code as applied to the Ceded Strip. It argued the Tribe lacked authority under its constitution to impose a tax outside of the reservation's exterior boundaries and it argued that the tax was inconsistent with the terms of the amended lease and settlement agreement of 1974.

49. The Department of Interior approved the tax code for application within the exterior boundaries of the reservation, but not for the Ceded Strip.

50. Westmoreland, after the enactment of the 1976 tribal tax ordinance, refused to pay the tax. Westmoreland's objection to the tribal tax was motivated by the desire to avoid concurrent taxation by the Tribe and Montana, and its inability to pass on to its utility customers a tribal tax which was not approved by the Department of Interior.

51. In order to resolve the controversy between Westmoreland and the Tribe as to the Tribe's power to tax

coal mining on the Ceded Strip these two parties, in 1982, entered into an amended lease agreement. In the amended lease agreement, Westmoreland agreed to pay the Tribe a tax equal to the Montana taxes existing at that time, less whatever amount was required to be paid in severance and gross proceeds taxes to the state and its political subdivisions. The amended lease further stated:

... Compliance with the terms of this Amendment shall satisfy any obligation which Lessee may have now or at anytime hereafter to pay any severance or other tax to Lessor pursuant to any tax ordinance which now exists or may be adopted by Lessor hereafter, and Lessor shall not attempt to assess or collect any tax or other amount from Lessee except as provided for in the lease as amended.

52. In November of 1982, the Tribe and Westmoreland jointly filed a motion to deposit severance tax payments into this Court's registry, pending resolution of the controversy over the validity of the Montana coal taxes.

53. It appears from the lease language and the record, then, that an agreement between Westmoreland and the Tribe was reached allowing the Tribe to have a tax code in place to claim amounts paid into the Court registry if it were to win its litigation as to the Montana taxes, and to allow Westmoreland to avoid double taxation, whether in the past or in the future.

54. Joe Presley wrote to one of Westmoreland's utility customers a letter dated January 29, 1982, stating that the Tribe's severance tax was not effective on the Ceded Strip and he did not see any possibility of a retroactive

application of the tax. The following testimony reflects the position of Westmoreland's president on these issues:

Q. (By Mr. Ross) So, Mr. Presley, as late as January 29, 1982, was it your understanding that the Tribe's constitution had never been properly amended to extend taxing jurisdiction to the ceded area?

A. January of '82, you said?

Q. Yes.

A. That was my understanding.

Q. And was it also your understanding as of January, 1982, that the Tribe's tax ordinance had never been approved by the Secretary of the Interior as to apply to the ceded area?

A. As of January, '82?

Q. Correct.

A. Yes.

Q. And under those circumstances, would Westmoreland have paid the Tribe a tax during that 1975 to 1982 time period, in the absence of Secretary approval?

A. No, it would have - there would have to be a valid, existing tax ordinance for us to be able to pass it through to our utility customers.

Q. And is your testimony the same even if the Montana tax did not exist?

A. Yes.

Q. Did the Tribe ever attempt to enforce or collect any taxes from Westmoreland under

its 1976 tax ordinance between the 1975 and 1982 time period?

A. No.

Trial Transcript, pp. 203-204.

Presley went on to testify:

Q. (By Mr. Ross) Was it your understanding when you signed the June, 1982, agreement, that the Tribe did not have at that time a valid tax ordinance as to the ceded area?

A. It was our understanding they did not. However, our attorney was very insistent, as soon as possible after this document was signed, the Tribe would proceed to amend their constitution so we would have a valid, existing tax, which then would allow us to pass the tax on to our utility customers. This amendment provides that we will pay the Tribe a tax, a severance and gross proceeds tax equal to the then state tax, less any tax that we had to pay to the state. So we felt that this agreement protected us from double taxation.

Q. And was it your understanding that the agreement to pay a tax would apply from the date of that agreement forward?

A. We felt that this ordinance gave us a release from any obligation we had in the past, and limited the obligation we would have to the Tribe only to the extent in the future to the severance and gross proceeds tax. The agreement also provided that the Tribe would not levy any other taxes on us or any other assessments other than the severance and gross proceeds tax.

Q. Was it your understanding that under the 1982 agreement, the Tribe released Westmoreland from any tax liability for the 1975 to 1982 time period?

A. Yes.

Trial Transcript, p. 206.

55. The amended lease agreement was approved by the Assistant Secretary of the Interior Department for Indian Affairs. In January of 1983, this Court issued an injunction against the collection of the severance tax and allowed deposit of the tax payments into this Court's registry. It granted the same relief as to the gross proceeds tax in November of 1987.

56. Westmoreland deposited severance tax payments in the amount of \$23,404,483.74 into the district court registry pursuant to the Court's order of January 4, 1983, and gross proceeds tax payments in the amount of \$536,475.06 into that registry pursuant to the Court's order dated November 25, 1987. These funds, along with accumulated interest, were turned over to the Bureau of Indian Affairs in trust for the Tribe in 1989.

57. The record is clear that Westmoreland did not pay to the Tribe any taxes during the 1975 through 1982 period. Based upon the evidence, I further find that Westmoreland, during this period, would not have paid coal taxes to the Tribe as no Department of Interior approval had been obtained to allow a pass-through to its customers.

58. Westmoreland has not paid any taxes to the Tribe pursuant to the Tribe's 1976 coal tax ordinance.

Pursuant to the September 1982 lease agreement, Westmoreland has paid the Tribe amounts equal to the state severance tax obligations of Westmoreland for the period commencing July 1, 1982 through the present. Pursuant to the September 1982 lease amendment, Westmoreland also has paid the Tribe amounts equal to the state gross proceeds tax for the period commencing with the gross proceeds tax payment due to Big Horn County in November 1987 through the present.

59. The Court of Appeals in *Crow II*, 819 F.2d at 903, found that the Montana taxes were preempted by federal law. This Court in its Memorandum, Opinion and Order of July 11, 1988, determined that the Interior Department's refusal to approve the Tribe's tax on the Ceded Strip was an error, and that at all relevant times the Tribe had a valid coal mining tax applicable to Westmoreland's mining on the Ceded Strip. The July 11, 1988 ruling, however, was issued not to address an obligation by Westmoreland to pay amounts prior to 1982, but as a basis for ordering that the escrowed funds be released to the Tribe and not Westmoreland by virtue of the 1982 lease agreement.

Regardless of the above-stated rulings and their context, they do not change the fact that Westmoreland would not have paid any amounts under the Tribe's 1976 tax code, and that the Tribe and Westmoreland agreed that Westmoreland would have no tax liability during the 1976 to 1982 period. In addition, the above-cited rulings do not support a conclusion that the presence of the Montana coal taxes caused the Department's error. The evidence indicates that the Department withheld approval because of questions as to the Tribe's authority

to tax on the Ceded Strip and later because the Tribe failed to follow its own constitutional procedures in amending its constitution for purposes of imposing the coal tax, and not because Montana had its tax in place.

60. Westmoreland did not initiate appropriate proceedings under Montana law to recover a refund of the severance and gross proceeds taxes paid to Montana and Big Horn County based on the production of Crow coal.

61. Montana, Big Horn County, and Westmoreland entered into an agreement providing for the settlement and dismissal with prejudice of Westmoreland's cross-claims against Montana and Big Horn County in response to the Tribe's third amended complaint. Under that agreement, Westmoreland waived and/or disclaimed any claim of entitlement to a refund of severance and gross proceeds taxes paid to the state and county between and including the calendar years 1974 and 1987 with respect to Ceded Strip production under its leases with the Tribe. This agreement was executed on September 6, 1991.

#### COSTS OF STATE AND COUNTY SERVICES AS OFFSETS TO UNJUST ENRICHMENT

62. Evidence was presented at trial concerning the costs of services defendants provided to tribal members during the period of 1975 and 1982. This evidence was presented for consideration as an offset to any unjust enrichment to Montana and Big Horn County from their taxes during this period. These services were categorized as health and social services, natural resources, agriculture and livestock, transportation, commerce and labor, and public safety.

63. This evidence, in the interests of considering the broader relationship between the parties, included the above-identified range of services provided to Crow tribal members living off the reservation, as well as those within the reservation boundaries.

64. The experts retained by defendants to analyze and quantify the cost of services indicated that for the most part the services would have been rendered even in the absence of Westmoreland's Absaloka Mine and were not related to the mine.

65. However, as to the Ceded Strip, this Court has found that the Tribe provided little or no governmental services to the Ceded Strip and has not exercised general civil jurisdiction in the ceded area. Rather, the state and the counties of Big Horn, Treasure, and Yellowstone have always provided public services on the Ceded Strip, many of which facilitated the mining of coal. *Crow Tribe of Indians v. United States*, 657 F.Supp. 573, 579-582.

#### INTERFERENCE WITH SHELL

66. The Court of Appeals found that Montana's coal taxes impaired the Tribe's ability to negotiate leases with Shell and other coal companies. *Crow II*, 819 F.2d at 903. The record also reflects the existence of additional reasons for Shell's failure to mine Crow coal and its cancellation of utility contracts.

67. In June of 1972, the Tribe and Shell entered into a lease agreement as to coal underlying approximately 30,000 acres within the reservation boundaries. It was Shell's intention to develop a facility, known as the

Youngs Creek Mine, on this acreage. In anticipation of the mine's construction, Shell secured contracts from Cajun and HL&P which would be fulfilled from Youngs Creek production. These contracts were signed in 1974 and 1975 and eventually cancelled by mutual agreement in 1981.

68. Prior to the execution of the Cajun and HL&P contracts, Shell was on notice that the Tribe was dissatisfied with the 1972 lease. In July of 1974, the Tribe adopted a resolution declaring that all tribal coal mining leases, whether existing or pending, to be null and void. The Tribe advised Shell that any additional investments by it, in connection with the lease, would be at Shell's own risk and that no subsequent act of the Tribe would be construed as a waiver of the Tribe's right to challenge the validity of the Shell lease.

69. Discussions between Shell and the Tribe were held in 1975 and 1976 over the Tribe's dissatisfaction with the 1972 lease.

70. The Tribe had concerns about Shell's management rights and its own sovereignty relating to control of coal mining operations on the reservation. The Tribe had concerns with the size of the lease and wanted it limited. It also had concerns about Shell providing its members employment opportunities.

71. In 1976, the Tribe filed a lawsuit against Shell, the federal government, and other coal companies. *Crow Tribe v. Kleppe*, No. CV 76-10-BLG (D.Mont.). In *Kleppe*, the Tribe sought to invalidate the 1972 lease with Shell.

72. In support of its lawsuit, the Tribe cited the Department of Interior's failure to comply with federal

regulations limiting coal leases to 2,560 acres absent requisite findings, and its failure to comply with the **National Environmental Policy Act** prior to approving the leases.

73. On January 25, 1977, Shell informed Cajun that it could not predict with accuracy when coal deliveries would commence. It recognized Cajun's need to secure alternate coal supplies. Accordingly, Cajun entered into an alternate agreement from another coal supplier for the years 1979 through 1983 on the same schedule as set forth in its contract with Shell.

74. After the commencement of this lawsuit, Shell discontinued active coal development efforts. In May of 1978, this Court entered judgment in favor of the Tribe voiding the Shell and Amax leases' approval for failure to comply with federal regulations.

75. In addition to *Kleppe*, Shell official F. K. Blackard, at the 1984 trial, identified other impediments to successful negotiations with the Tribe. There was concern with the Crow Land Use Ordinance in that Shell feared the Tribe would impose constraints Shell could not abide. For periods, there was internal conflicts among tribal factions, which clouded who was the true negotiating agency for the Tribe. Various resolutions were passed by the tribal council restraining the authority of tribal officers and entities from representing and negotiating on behalf of the Tribe.

76. The Tribe also had financial concerns. In light of Montana's coal taxes, many tribal members became dissatisfied with the financial terms of the 1972 Shell lease,

as well as the 1974 Westmoreland lease. The Tribe realized there were more profitable ways to deal with coal companies and it considered the Shell lease outdated. The existence of the Montana coal taxes left less room for the Tribe and Shell to negotiate more favorable financial terms to the Tribe. One response by the Tribe to the Montana taxes was the enactment of its own tax in 1976.

77. Shell discontinued development until 1980, when it and the Tribe executed an agreement as to coal underlying 2,560 acres within the reservation. The 1980 Shell agreement contained a royalty rate of 12 and one-half percent (the federal rate applying to the Powder River Basin) and bonuses. On December 30, 1985, Shell relinquished its rights under the 1980 agreement.

78. Under these circumstances, it was not surprising that Shell had given notice in 1976 to Cajun and HL&P under their contracts, force majeure provisions that it would be unable to supply coal from the Youngs Creek Mine as previously agreed and that those utilities would satisfy their coal demands elsewhere - at least until the mine status could be resolved.

79. The record does not support the assertion that the Montana coal taxes were responsible for the loss of revenue due to the protracted negotiations between Shell and the Tribe. The issues of acreage size, options on additional tracts, tribal control over mining operations, and tribal ordinance restrictions were definite and sharp points of disagreement which clearly delayed successful lease negotiations.

80. Further, it does not appear the defendants took action which had as a conscious objective interference

with the contractual relationship between the Tribe and Shell or that they knew enactment or enforcement of the state taxes would cause Shell to breach its contractual undertaking with the Tribe.

81. The record, then, does not contain persuasive evidence that but for the state's coal taxes, the Youngs Creek facility would have developed to source the Cajun and HL&P contracts. Other factors, such as the delay anticipated by the need to comply with environmental laws, internal turmoil within the Tribe concerning coal development generally, and the Shell lease specifically, which resulted in the 1974 tribal resolution declaring void that lease, and subsequent litigation initiated by the Tribe to set aside the Shell lease, were the causative factors for the Youngs Creek facility not being developed to supply the Cajun and HL&P contracts.

## II.

### CONCLUSIONS OF LAW

#### JURISDICTION

1. This Court has jurisdiction of this matter under 28 U.S.C. §§ 1331, 1345, and 1362. Venue is established under 28 U.S.C. § 11391(B).

2. Defendants assert this Court lacks jurisdiction over the Tribe's claim on the basis of a state's immunity from federal court suit under the Eleventh Amendment. This issue was previously determined against the defendants by this Court in its Memorandum, Opinion and Order of December 26, 1990 denying defendants' motion for summary judgment.

### RESTITUTION CLAIM BASED UPON COLLECTED TAXES

3. This is a restitution action based upon principles of equity. The Tribe and the United States seek a judgment based upon coal taxes collected by defendants from 1975 through 1982.

4. The specific theories of restitution invoked in this case are *assumpsit* and constructive trust, which both turn on a finding of actionable unjust enrichment. *Assumpsit* relief is quasi-contractual in nature and allows a petitioner to obtain a judgment based upon personal liability, while the constructive trust is generally applied to actions for specific relief. See Memorandum, Opinion and Order, December 26, 1990, pages 4-5 (citing Restatement of Restitution, § 160, Comment A (1937)).

5. The substantive elements of a claim for restitution, whether based upon *assumpsit* or constructive trust, are a wrongful act, specific property acquired by the wrongdoer traceable to the wrongful act, and a reason, in equity and fairness, why the person holding the property should not be allowed to keep it. Memorandum, Opinion and Order, December 26, 1990, page 15 (citing *Alsco-Harvard Fraud Litigation*, 523 F.Supp. 790, 806-807 (D.C. 1981); *Schaeffer v. Miller*, 109 P. 973 (1910)).

6. Both *assumpsit* and constructive trust, then, request somewhat different remedies based upon establishing a viable quasi-contract claim for money had and received. See, generally, Restatement of Restitution, § 160, Comment A (1937). At the heart of any such action lies a claim of unjust enrichment and liability dictated by the needs of justice and fairness. *United States v. Nierdorf*,

522 F.2d 916, 918-19 and n. 5 (9th Cir. 1975), *cert. denied Nierdorf v. United States*, 423 U.S. 1087 (1976).

7. Generally, the principle of unjust enrichment requires that one who has been unjustly enriched at the expense of another must make restitution to the other. One is enriched if he has received a benefit, and unjustly enriched if retention of the benefit would be unjust. Restatement of Law of Restitution, § 1, Comment a. Even when a person has received a benefit from another, he is liable to pay therefor only if the circumstances of its receipt are such that, as between the two persons, it is unjust for him to retain it. *Id.* at Comment c.

8. The tribal and federal interests which the Court of Appeals in *Crow II* determined preempted Montana's coal taxes give rise to federal jurisdiction in equity to construct a remedy that refers to state law, but is not defeated by it. *Id.*, at page 10.

9. This Court has previously determined, then, that this restitution cause of action borrows its elements from state common law. Memorandum, Opinion and Order, December 26, 1990, page 9, relying upon *City of New Orleans v. United States*, 371 F.2d 21 (5th Cir. 1967). The substantial question of federal law that carries with it federal jurisdiction is whether the defendants' have been unjustly enriched at the expense of the Tribe through the collection of coal taxes. *Id.* at page 9.

10. In determining unjust enrichment, I find it proper, then, to consider all relevant equitable factors bearing on these parties and the circumstances giving rise to this restitution claim.

11. Federal policy favors tribal self-government and economic development. *Crow I*, 650 F.2d at 1112-1113. Economic evidence before this Court plainly indicates the Tribe's need for revenues to further these purposes. The Court of Appeals ruled in *Crow II*, 819 F.2d at 903, that Montana's coal taxes were preempted by federal law and policies and void for interfering with tribal government. In spite of the fact that Montana's taxes were imposed on Westmoreland, the Tribe's lessee, and not the Tribe, the Court of Appeals found preemption because Montana's coal taxes burdened the Tribe's economic interests by increasing the costs of production by coal producers, which reduced royalties received by the Tribe. *Id.* at page 899. Certainly, then, prior court rulings as to the economic burden on the Tribe by Montana's coal taxes is a significant equitable factor favoring the Tribe.

12. Significant also in favoring the Tribe is the ruling in *Crow I*, 650 F.2d at 114, that the coal taxed by Montana and Big Horn County, although underlying the Ceded Strip, was a mineral resource of the Tribe.

13. I also note the Tribe's own authority to tax non-Indians who conduct business on the reservation. This is an inherent power necessary to tribal self-government and territorial management. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141 (1982).

14. I also consider the interests of Montana in deciding the equities of this case. State governments commonly receive both royalty payments and severance taxes from lessees of mineral lands within their borders. Montana has been doing so since 1921. Montana may constitutionally raise general revenue by imposing a severance

tax on coal mined in the state. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 612, 624 (1981).

15. Generally, there is not, nor has there been, an automatic bar to state taxation of matters significantly touching the political and economic interests of Tribes. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 157 (1980). A state may validly impose severance taxes on the same reservation production by non-Indians lessees as is subject to the Tribe's own severance tax. *Cotton Petroleum Corporation v. New Mexico*, 490 U.S. 163, 166 (1989). Notwithstanding federal policy, then, to provide tribes with badly needed revenue, in considering the interests of states, the Supreme Court in *Cotton* determined that there has not been congressional intent to remove all barriers to tribal profit maximization. *Id.* at 180.

16. There are circumstances, however, which negate a state concurrently imposing a tax on mineral production by non-Indian lessees of a tribe's resources. *Cotton Petroleum*, 490 U.S. at 166. The preemption of a state's taxes by a tribe's taxes depends upon the particular state, federal, and tribal interests involved. *Id.* at 184. Although this was not a scenario where Montana had nothing to do with Westmoreland's mining activities except tax it, preemption was ultimately approved by the Supreme Court because Montana's coal taxes were deemed unusually large and imposed a substantial economic burden on the Tribe. *Id.* at 186, n. 17.

17. The factors which dictated preemption in this case, however, do not necessarily implicate a restitution remedy. I have previously determined that it is a question

of fact where the equities lie in this case and, more fundamentally, whether a remedy in restitution arises at all in this case. (Memorandum, Opinion and Order, December 26, 1990, page 18.)

18. In continuing to look at equitable factors, I note that while tribes have an interest in raising revenues for essential government programs, that interest is strongest when revenues are derived from value generated on the reservation by activities involving the tribe and when the taxpayer is the recipient of tribal services. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 477 U.S. at 157. However, as to the Ceded Strip, this Court has found that the Tribe provided little or no governmental services and has not exercised civil jurisdiction in the ceded area. Public services to residents and businesses on the Ceded Strip, many of which facilitate the mining of coal, have been provided by the state and its subdivisions. *Crow Tribe v. Montana*, 657 F.Supp. 573, 579-582.

19. I do not lose sight of the fact that, notwithstanding its severity, the Montana coal severance tax was found by the Supreme Court in 1981 to be lawful and not offensive to the Commerce Clause nor the Supremacy Clause. *Commonwealth Edison Co. v. Montana*, 453 U.S. at 609. The Court found the tax met the four-part Commerce Clause test under *Complete Auto-Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977), in that: (1) it applied to an activity with a substantial nexus with the taxing state; (2) it was fairly apportioned; (3) it did not discriminate against interstate commerce; and (4) it was fairly related to services provided by the state. *Id.*

20. States have considerable latitude in imposing general revenue taxes. *Id.* at 622. There is no Due Process Clause requirement that the amount of general revenue taxes collected on a specific activity be reasonably related to the value of services provided to the activity. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. Any other view would abandon the fundamental principle of government that it exist primarily to provide for the common good. *Id.* at 622-623, relying upon *Carmichael v. Southern Coal and Coke Company*, 301 U.S. 495, 521-523 (1937). In that regard, the record most certainly reflects that the Tribe and its members have been beneficiaries of state services and the societal organization protection and common good that they promote.

21. The Court of Appeals in *Crow II* was not deterred by the constitutional analysis of *Commonwealth Edison* in determining that Montana's coal taxes are preempted. In determining the appropriateness of an award to the Tribe in restitution, I see the principles of *Commonwealth Edison* as relevant, although not determinative.

22. In light of the above-stated authority, I find that the authority of the Tribe to impose taxes on Westmoreland to the exclusion of defendants was a properly contested issue and not legally determined until after the 1975 to 1982 period.

23. In analyzing the damages issues separate and apart from a preemption analysis, it is reasonable that there is no entitlement to restitution without the presence

of the predicates for common law recovery in quasi-contract.

24. In that light, this is not a typical or an arguably proper unjust enrichment case. Restitution contemplates a relationship between the parties wherein a plaintiff is required to show: (1) a benefit conferred on defendant by the plaintiff; (2) acceptance of the benefit by the defendant; and (3) circumstances which make it inequitable for defendant to retain the benefits. *FDIC v. British-American Corporation*, 755 F.Supp. 1314, 1324 (E.D. North Carolina 1991); *Schaeffer v. Miller*, 109 P. 970 (1910). Clearly, defendants have not received benefits from the Tribe nor has the Tribe given benefits to defendants. The funds paid to Montana and Big Horn County belong to Westmoreland and not the Tribe. This lack of privity did not bar preemption of defendants' taxes by the Court of Appeals. Again, however, I find it has its place in determining restitution damages.

25. In addition to determining that recovery in this action turns upon a finding of unjust enrichment, *id.*, at 15 (citing *Midcoast Aviation, Inc. v. General Electric Credit Corporation*, 907 F.2d 732, 743 (7th Cir. 1990)), I have relied upon *Valley County v. Thomas*, 97 P.2d 345 (Mont. 1939), for the principle that a county could recover in restitution against another county, even when privity is lacking.

While restitution recovery here need not turn on privity, I do not find that *Valley County* supports a broad principle removing privity between a plaintiff and defendant as a restitution consideration. In *Valley County*, the

required privity was supplied by the Montana state statute binding upon both counties, which required license fees to be paid to that county in which the automobile's owner was domiciled, i.e., both counties claimed and could receive the fees only pursuant to the same statute. No contention has been, or can be, made here that the Tribe was an intended beneficiary of the obligations imposed on Westmoreland by the Montana coal taxes.

26. In finding preemption, the Court of Appeals in *Crow II* found that defendants' taxes had a negative financial impact on tribal resource development activities. 819 F.2d at 899-900. This preemption finding may appear on its face to dictate a quasi-contract finding that defendants were, therefore, unjustly enriched at the Tribe's expense during the 1975-1982 period. For purposes of this analysis, however, I find it proper to consider additional factors bearing on defendants' receipt of the tax money and what was occurring between the parties to determine if it is unjust for defendants to retain the benefits. Restatement of Law of Restitution, § 1 at Comment c.

27. In considering the relationship between the parties, I find that defendants received Westmoreland's tax payments under color of state law. During the 1976 to 1982 period, Westmoreland paid a tax to defendants, which obligation was independent from any obligations to the Tribe. As stated above, there is no automatic bar to more than one sovereign to concurrently taxing the same activity. *Cotton Petroleum*, 490 U.S. 188-189. Westmoreland did not initiate available proceedings to recover taxes paid to defendants. M.C.A. § 15-1-402-406. In so

finding, I do not criticize or second guess Westmoreland's strategy in response to the potential of double taxation.

28. At the same time, it does not follow that defendants, who received taxes from Westmoreland under what was then an existing lawful obligation, now owe restitution damages to the Tribe in light of the failure of Westmoreland to initiate appropriate proceedings to recover funds. The opposite result would now allow the Tribe and the United States to recover taxes which the actual taxpayer admittedly cannot. The Tribe could have redressed Westmoreland's omission by proceeding against Westmoreland or it could have contracted with Westmoreland to initiate such appropriate action to recover the Montana taxes.

29. Equitable relief will not be granted if the requesting party possessed adequate legal remedies to address the alleged wrong, e.g., *Meyer v. Lemley*, 86 Mont. 83, 92, 282 P. 268, 271 (1929); *Knighton v. Texaco Producing, Inc.*, 762 F.Supp. 686, 693 (W.D. Louisiana 1991). The Tribe possessed adequate legal remedies.

30. Even if the appropriate quasi-contract relationship between the parties could be implied, the evidence does not show that but for defendants' imposition of its taxes, the Tribe would have collected from Westmoreland or Westmoreland would have paid to the Tribe coal taxes from 1975 to 1982. Rather, it reflects the Tribe would not have collected coal taxes regardless of the existence of defendants' coal taxes. The Tribe was not in a position to impose its coal tax on Westmoreland during this period. This disability was not due to the presence of Montana's taxes. Congress set up a series of federal checkpoints that

must be cleared before a tribal tax can take effect. Under the **Indian Reorganization Act**, 25 U.S.C. § 476-477, a tribe must obtain approval from the Secretary of the Interior before it adopts or revises its constitution to announce its intent to tax non-members. Further, before the ordinance imposing the severance tax can take effect, the Tribe was required to obtain approval from the Secretary. These congressional hurdles were not cleared by the Tribe as to taxing Ceded Strip coal during the relevant period. My factual findings show no evidence that the Tribe's failure to do so was caused by Montana's taxes. I find this very significant and relevant to an unjust enrichment determination.

31. It is clear that defendants were enriched by their taxes on Westmoreland's coal mining activities on the Ceded Strip. It is only the enrichment which is unjust, however, that supports a restitution award. *Robertus v. Candee*, 670 P.2d 540, 543 (Mont. 1983). Further, the task here is to not necessarily remove all benefit to a defendant, but to remove the enrichment which plaintiff can establish as unjust. *Midcoast Aviation*, 907 F.2d at 745. I am not convinced that defendants' enrichment has been unjust or that restitution is in order.

32. Legal precedent addressing the equity of restitution in like situations is scant, but noteworthy. In *Ute Tribe v. State Tax Comm'n. et al.*, 574 F.2d 1007 (10th Cir. 1978), cert. denied 439 U.S. 965 (1978), the tribe sought relief from Utah taxes on the sale of personal property made by tribal enterprise made within the reservation. The Circuit held that while the Utah tax was applicable to sales on trust lands to non-Indians, sales not on trust

lands were not within state taxing power. Without citation to authority concerning the construction of equitable remedies, the court stated:

Insofar as this action seeks to have the state of Utah return sales taxes collected by the tribe under a generalized or lump-sum claim, it must fail as these funds now in the hands of the state were paid by the buyers of the goods and not the sellers. If anyone can seek a recovery, or refund, it is these buyers.

The *Ute* decision clearly comports with above-cited restitutionary principles.

33. In *Crow I*, the Court of Appeals stated, in a footnote, that "as to the taxes already paid by Westmoreland, however, it is true that the Tribe has not paid any of the taxes and is apparently not entitled to any refund if the tax statutes are declared invalid." 650 F.2d at 1113, n. 13.

34. Although not deterred by this language of *Crow I* in denying summary judgment to defendants (see Memorandum, Opinion and Order, December 26, 1990, page 12), upon further consideration I revisit that issue. First, the rationale in the 1990 opinion was based upon this Court's earlier opinion which concluded that the Tribe had a valid tax in place at all relevant times. (Opinion and Order, September 11, 1988). However, the Court, in the 1988 opinion, was not in any manner addressing a right to restitution based upon taxes collected during 1976 to 1982. It was, rather, addressing whether the approximately \$28,000,000.00 paid into the Court's registry by Westmoreland since 1983 should be released to the

Tribe and not Westmoreland by virtue of the 1982 lease agreement between these two parties.

35. I find that in weighing the principles of restitution and the equities, restitution damages based upon the Montana coal taxes collected between 1975 and 1982 are not warranted and should not be granted.

#### INTERFERENCE WITH SHELL CONTRACT CLAIM

36. In the final pretrial order, the Tribe and the United States also claimed restitution damages on the grounds that defendants were unjustly enriched as a result of their tortious interference with the Tribe's contractual and business relationships with the Shell Oil Company.

37. This claim in restitution is one of tortious acquisition of a benefit. It is alleged that defendants, via their taxing activities on reservation coal, interfered with coal mining lease agreements between Shell and the Tribe. It is also alleged that defendants' activities caused the cancellation of the contracts between Shell and two utilities, Cajun and HL&P.

38. The substantive elements of this claim are drawn from the intentional tort of interference with contractual and business relations. To establish a *prima facie* case of interference with contractual or business relations, it must be shown that the acts: (1) were intentional and willful; (2) were calculated to cause damage to the plaintiff in his or her business; (3) were done with the unlawful purpose of causing damage or loss, without right or justifiable cause on the part of the actor; and (4) that

actual damages and loss resulted. *Bolz v. Myers*, 651 P.2d 606, 611 (Mont. 1982).

Interference can give rise to tort liability only if one intentionally intermeddles with another's contractual or business relations to which one is a stranger. Restatement 2d of Torts, § 766A (1979).

Restatement 2d of Torts, § 767 (1979) sets out factors to be considered in determining whether intentional interference with contractual rights is improper. Those factors are: (a) the nature of the actor's conduct; (b) the actor's motives; (c) the interests of the other with which the actor's conduct interferes; (d) the interest sought to be advanced by the actor; (e) the social interest in protecting the freedom of action of the actor and the contractual interest of the other; (f) the proximity or remoteness of the actor's conduct to the interference; and (g) the relations between the parties.

39. It is clear that the motivating interests for the actions by all the parties are economic. Each entity during this period sought to lawfully profit from resources in which it had an obvious and reasonable interest.

40. In considering the intentional interference claim as it pertained to the then existing coal lease agreement between the Tribe and Shell, my Findings of Fact negate the claim that defendants tortiously interfered with this contract. The state taxes certainly did not cause Shell to breach its coal lease agreement. Rather, the Tribe, on grounds not related to Montana's taxes, sought to invalidate that lease and its efforts led to this Court's action doing so in 1978.

41. I must also consider the alleged interference as it relates to the prospective contractual relations between Shell and the Tribe, that is, their renegotiation process after the 1978 cancellation of the lease.

42. As to both the existing and the prospective contracts, the record is devoid of evidence that defendants' coal taxes were calculated to cause damages to the Tribe and specifically to cause it and Shell to not conduct coal mining business together. There was also no evidence that defendants knew this consequence would result from its taxes.

43. The fact that Montana's coal taxes were later preempted and declared invalid does not mean that between 1976 and 1982 they were levied with an unlawful purpose. The record does not support that conclusion either.

44. The presence of the numerous factors (set forth in the Findings of Fact) which were points of disagreement and which delayed successful negotiations between the Tribe and Shell, and which were not related to defendants' taxes, do not support a cause and effect relationship between Montana's coal taxes and the Tribe's alleged damages. I do not find that the damages and losses claimed by the Tribe due to the loss of Shell's business resulted from the actions of defendants.

45. For these reasons, I do not find that the Tribe and the United States have proved facts which support restitutionary damages to them on the basis of this tortious interference claim. They should not be awarded such damages.

46. For the foregoing reasons, I conclude that the Tribe and the United States are not entitled to damages.

Based on the foregoing Findings of Fact and Conclusions of Law,

**JUDGMENT IS HEREBY ENTERED IN FAVOR OF DEFENDANTS.**

The Clerk of Court shall forthwith notify the parties of the entry of judgment herein.

**DONE** and **DATED** this 23rd, day of November, 1994.

/s/ Jack D. Shanstrom  
United States  
District Judge

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The CROW TRIBE OF INDIANS, Plaintiff-Appellee,

v.

STATE OF MONTANA; Denis Adams, Director,  
Montana Department  
of Revenue; Big Horn County, Montana; Lorraine  
Hamilton, Treasurer, Big Horn County,  
Montana, Defendants-Appellants,

and

Westmoreland Resources, Inc. Defendant-Intervenor,

v.

UNITED STATES of America,  
Plaintiff-Intervenor-Appellee.

No. 91-35682.

United States Court of Appeals,  
Ninth Circuit.

Argued and Submitted July 9, 1992.

Decided July 23, 1992.

Clay R. Smith, Sol., State of Mont., Helena, Mont.,  
John W. Ross, Sp. Asst. Atty. Gen., Billings, Mont., Chris-  
tine A. Cooke, Big Horn County Atty., Hardin, Mont., for  
defendants-appellants.

Robert S. Pelcyger, Fredericks, Pelcyger & Hester,  
Boulder, Colo., for plaintiff-appellee.

Edward J. Shawaker and Elizabeth Ann Peterson,  
U.S. Dept. of Justice, Washington, D.C., for plaintiff-  
intervenor-appellee.

Appeal from the United States District Court for the  
District of Montana.

Before: ALARCON, RYMER, and T.G. NELSON, Cir-  
cuit Judges.

### ORDER

The district court certified for interlocutory appeal its denial of appellant's Motion to Dismiss for failure to state a claim on which relief can be granted. This court granted permission for the appeal on July 17, 1991.

The sole issue on this appeal is whether the Crow Tribe and the United States, as its trustee, can state a claim for relief in claiming assumpsit, for money had and received, and constructive trust in its Fourth Amended Complaint. Montana contends there must be, if not priv-ity, then a duty inter sese between the interests of the Crow Tribe and the money collected from a third person by Montana's void tax. This contention was already addressed by this court in *Crow Tribe of Indians v. State of Montana*, 819 F.2d 895 (9th Cir.1987) (*Crow II*), *aff'd*, 484 U.S. 997, 108 S.Ct. 685, 98 L.Ed.2d 638 (1988), when we said:

Montana argues that its taxes do not burden Crow's economic interests because the Tribe itself does not pay the tax. In other words, the taxes were imposed on the lessee, Westmoreland, and the Tribe had no duty to reimburse. So, says Montana, the Tribe's economic interests were not affected.

We have already rejected this argument. *Crow I*, 650 F.2d at 1113 n. 13. The state taxes increase the costs of production by the coal producers, reducing in turn the royalty that can be paid the Tribe. The taxes also forced the coal

producers to charge higher prices, reducing the demand for their Montana coal and resulting in fewer sales for the producers and fewer royalties to the Tribe.

819 F.2d at 899.

We went on to say in Crow II:

Montana taxes mineral resources that are "a component of the reservation land itself." Crow I, 650 F.2d at 1117. The tax revenue from coal production could generate funds for tribal services and provide employment for tribal members. Mescalero, 462 U.S. at 341, 103 S.Ct. at 2390. By taking revenue that would otherwise go towards supporting the Tribe and its programs, and by limiting the Tribe's ability to regulate the development of its coal resources, the state tax threatens Congress' overriding objective of encouraging tribal self-government and economic development.

819 F.2d at 902-903.

Permission to appeal was improvidently granted.  
Appeal DISMISSED.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
BILLINGS DIVISION

THE CROW TRIBE OF	) Cause No.
INDIANS,	) CV 78-110-BLG-JDS
Plaintiff,	)
vs.	)
UNITED STATES OF	)
AMERICA,	)
Plaintiff-Intervenor,	)
vs.	)
STATE OF MONTANA, et al.,	)
Defendants,	)
WESTMORELAND	)
RESOURCES, INC.,	)
Defendant-Intervenor.	)

OPINION AND  
ORDER OF  
CERTIFICATION  
FOR  
INTERLOCUTORY  
APPEAL  
\*\*\*\*\*  
(Filed May 29, 1991)

Two motions remain unresolved in this matter and both bear greatly on further proceedings. First, the Crow Tribe, with the support of the United States, seeks an amendment of my December 26, 1990 Opinion and Order. Second, the State of Montana and the County of Big Horn move for certification of the same Opinion and Order pursuant to 28 U.S.C. § 1292(b). Specifically, the defendants seek to appeal my decision that plaintiffs have stated a claim upon which relief can be granted.

### DISCUSSION

#### I. DEFENDANT'S MOTION FOR CERTIFICATION OF INTERLOCUTORY APPEAL

Both parties acknowledge that the December 26, 1990 Opinion and Order triggers an enormous amount of discovery, research and equitable fact finding. Defendants argue, and I concede, that this case involves novel issues of fact and law which, if overturned, would result in substantial cost to both parties and the judiciary. Plaintiffs respond that this case does not meet the "exceptional circumstances" test embodied in **Section 1292(b)**.

The legal and factual issues in this case are highly unusual and my decision to deny defendants' motion for summary judgment meets the appropriate criteria for certification for interlocutory appeal. **Section 1292(b)** provides:

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involved a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the court of appeals or a judge thereof shall so order.

Under this section, three parts are necessary: a controlling question of law, a substantial ground for difference opinion on the issue of whether plaintiffs have stated a claim, and the appeal must materially advance the termination of this litigation. *In re Cement Antitrust Litigation*, 673 F.2d 1020, 1026 (9th Cir. 1982), *aff'd sub nom Arizona v. Ashgrove Cement Co.*, 459 U.S. 1190 (1983). My decision rejecting defendants' motion for summary judgment certainly controls the remainder of this lawsuit. Immediate appellate review serves this Court's interest in maintaining judicial efficiency. A reversal at this stage could eliminate the extensive process of equitable fact finding and, on the other hand, an appellate affirmance might give further direction to these proceedings. The fact that defendants wish to appeal a motion for summary judgment does not impede this motion for interlocutory appeal. *Virgil v. Time, Inc.*, 527 F.2d 1122 (9th Cir. 1975), *cert. denied*, 425 U.S. 998 (1976). Defendants seek this appeal at a suitably early point in the case to avoid losing substantial headway in the development of a factual record. Simply put, this case remains a long way from final adjudication.

Since this case involves novel questions of law with little in the way of direct precedent, there are substantial grounds for disagreement as to whether plaintiffs have stated a claim. To meet the threshold requirements of **Section 1292(b)**, defendants point to their underlying argument which I chose not to adopt in my December Opinion; the incidence of tax falls on Westmoreland Resources, Inc., not on the Tribe. Both *Ute Indian Tribe v. State Tax Commission*, 574 F.2d 1007, 1009 (10th Cir. 1976), *cert. denied*, 439 U.S. 965 (1978), and Footnote 13 of

*Crow Tribe v. Montana*, 650 F.2d 1104 (9th Cir. 1981), amended 665 F.2d 1390, cert. denied, 459 U.S. 916 (1982) (*Crow I*), indicate that without losing money of its own, the Crow Tribe has no standing to pursue a refund from the State of Montana. I am not convinced that these cases bar this action, but I am concerned that the preemptive powers of the **Mineral Leasing Act of 1938**, 25 U.S.C. 396(a)-(g) (1982), and the Crow Tribe's tax code do not retroactively invoke this Court's broad powers in equity. There also exists a substantial question as to whether case law allowing equitable remedies for the recoupment of taxes between counties should extend by analogy to this action. This case involves substantial sums of money and the collection of any damages presumably would require an act of the Montana legislature. For these reasons, the final determination of defendants' challenge to this action must not be taken lightly.

Finally, I find that prompt appellate resolution of defendants' motion for summary judgment for failure to state a claim will materially advance the ultimate resolution of this case. It would be naive to presume that an appeal might not come from these proceedings. All parties are deeply entrenched and they simply have too much at stake to accept a decision at the district level. On the other hand, a determinative ruling from the appellate court at this point may well dissolve this case or move it more positively to an out-of-court settlement.

Despite the fact that plaintiffs filed this case in 1978, this branch of the litigation is still in its early stages. Nothing in plaintiffs' arguments convinces me that this is not a unique case suitable for interlocutory appellate review pursue [sic] to 28 U.S.C. § 1292(b). Therefore,

pursuant to defendants' motion, and upon a showing of good cause, I hereby certify an interlocutory appeal of defendants' motion for summary judgment for failure to state a claim upon which relief can be granted. To facilitate the purposes of an interlocutory appeal, I urge the appellate court to adopt an abbreviated briefing and hearing schedule so as not to leave stale much of the discovery that has proceeded in the past month. In addition, all further proceedings in this case are stayed pending either the circuit court's denial of an interlocutory appeal or a decision on the merits.

## II. PLAINTIFFS' MOTION TO AMEND THE DECEMBER 26, 1990 OPINION AND ORDER

Plaintiffs take issue with two portions of my December 26, 1990 Opinion. First, language near the end of the Opinion states that plaintiffs' award, *if any*, depends upon the equities of the case. Plaintiffs argue that this is a misstatement of the law and must be stricken. Second, plaintiffs urge me to reassess my statement regarding an award of prejudgment interest. The final portion of the Opinion states that an award of prejudgment interest must also await a full disclosure of the equities of this case.

Neither of these statements could be considered a holding in the case. There were offered merely to provide further direction for discovery and the presentation of this case. The core of the Opinion denied defendants' motion for summary judgment. The scope of this Court's power to grant equitable relief will be more fully defined in later stages of this case and in appellate review. None

**IT IS ORDERED:**

The Clerk of Court is directed to forthwith notify the parties of the making of this order and to process the interlocutory appeal.

/s/ Jack D. Shanstrom  
United States District Judge

Defendant State of Montana has moved the Court for summary judgment on issues of law concerning plaintiff's claim for monetary relief in equity. The primary hurdles raised before plaintiff's claims are: (1) lack of jurisdiction to proceed in federal court; (2) failure to state a viable claim for equitable relief; and/or (3) lack of standing to pursue an action against defendant. The issues in this case spring from poorly defined principles

of equity and, for the reasons expressed in the body of this opinion, they are not suitable for summary judgment at this time.

## I.

**DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT**

Facts

Although the background facts in this case have been thoroughly developed in earlier orders and opinions by both this Court and the Ninth Circuit Court of Appeals, they require some limited review for the purposes of this motion. In its historical context, this motion for summary judgment is a branch of the longstanding dispute between the Crow Tribe and the State of Montana over the application of a state severance tax to tribally-owned coal. The dispute arises on an area of land known as the "ceded strip," which includes some 1,137,500 acres of split estate land. Under a 1904 agreement with the United States, the Crow Tribe ceded this area to the United States for sale to homesteaders. The land was opened for sale to non-Indians in 1909, but only the surface rights were transferred in the sales. *Cady v. Morton*, 527 F.2d 786, 789 (9th Cir. 1975). Thus, the Crow Tribe has always retained an ownership interest in the mineral rights beneath this strip of land.

In 1972, the Crow Tribe leased two tracts of coal underlying the "ceded strip" to Westmoreland Resources, a non-Indian mining company. In 1975, the State of Montana enacted severance and gross proceeds taxes which, in some cases, exacted nearly 30% of the value of coal

mined within Montana. *See Mont. Code Ann. § 15-35-101-111* (1979); *Mont Code Ann. § 15-23-701-704* (1979). The State of Montana imposed this tax on coal removed from the "ceded strip" under lease with the Crow Tribe. The Tribe enacted its own severance and gross proceeds taxes in 1976 in **Resolution No. 76-21A** of the **Crow Tribal Taxation Code**. This tax was approved by the Department of the Interior as it applied to the Reservation, but the approval did not extend to the "ceded strip" because there was some doubt in the Department as to whether the Tribe's tax jurisdiction extended to the split estate lands. In July of 1978, the Crow Tribe brought this action to enjoin state taxation on the "ceded strip" and, thus, to allow the collection of its own tax.

Westmoreland paid the state severance taxes until 1983, when this Court enjoined the payments. However, through 1982, Westmoreland paid no taxes to the Tribe because the legal validity of the tax, as it applied to the "ceded strip," was in question. Any confusion regarding the legitimacy of the state tax was clarified in the September 11, 1988 Order stating, "The approval of the Department of the Interior of the 1976 Crow Tribal Tax Code as it applied to activities on the Reservation was necessarily an approval of that tax as being applicable to Westmoreland's mining of Crow Tribal Coal." Order of September 11, 1988, at page 7, CV 78-110-BLG-JFB. The tribal tax in effect between 1976 and 1982 was a 25% tax on the f.o.b mine value of all coal mined on the Reservation. After 1982, this Court ordered the state's coal taxes paid in escrow pending judicial determinations of the validity of

the tax and of the proper ownership and control of the tax revenues.

The central issue in this motion is whether the Tribe may invoke equitable remedies to recover taxes paid by a private coal company to the State of Montana under an invalid state law. Montana's coal severance tax did not survive the legal challenge brought by the Tribe in *Crow Tribe of Indians v. State of Montana*, 650 F.2d 1104 (9th Cir. 1981), *cert. denied* 459 U.S. 916 (1982), and *Crow Tribe*, 819 F.2d 895 (9th Cir. 1987), *aff'd* 484 U.S. 997 (1988) (hereafter *Crow I* and *Crow II*, respectively). In *Crow II*, the Ninth Circuit Court of Appeals held that Montana's coal tax cannot apply to coal mined on the Reservation because it is preempted by the federal **Mineral Leasing Act of 1938**, 25 U.S.C. §396(a)-(g) (1982), and because it invades the Tribe's inherent power of self government. *Crow II* at 903. Therefore, at all times after 1976, the Crow coal tax, by its very existence, superseded the Montana severance and the Big Horn County gross proceeds taxes on the "ceded strip" coal.

This holding has left two periods in which Westmoreland paid coal taxes to the wrong party: first, between 1975 and 1982, Westmoreland paid taxes to the State of Montana in a sum of approximately \$53,000,000.00, and second, between 1975 and 1988, Westmoreland paid about \$11,000,000.00 in gross proceeds tax to Big Horn County.

#### Discussion

Generally, this is an action in equity to prevent unjust enrichment by the State of Montana at the expense of the

Crow Tribe. *See Rest. of Restitution* § 1 (1936). The specific theories of restitution invoked in this case are *assumpsit* and constructive trust, which both turn on a finding of actionable unjust enrichment. *Assumpsit* relief is quasi-contractual in nature and allows a petitioner to obtain a judgment based upon personal liability, while the constructive trust is generally applied to actions for specific relief. *Rest. of Restitution*, § 160 comm. (a) (1936).

Based on principles of equity, the Tribe and the United States in trust for the Tribe seek a judgment against defendants for taxes wrongfully collected by the State in violation of the Tribe's sovereign tax jurisdiction. As a general principle, the goal of equitable relief is to restore the plaintiff to the fullest extent possible for the unjust enrichment of another. *Pangilinan v. INS*, 796 F.2d 1091 (9th Cir. 1986), *rev'd on other grounds by* 486 U.S. 875 (1988) (the court cannot fashion an equitable remedy in violation of statutory law). These remedies are said to be "a special blend of what is necessary, what is fair, and what is workable." *Lemon v. Kurtzman*, 411 U.S. 192, 200-01 (1973).

Defendants bring this matter before the Court as a motion for summary judgment. The Court reviews this motion for genuine issues of material fact pursuant to **Fed.R.Civ.P. 56(c)**. Therefore, the non-moving party must establish genuine issues of fact that exist with regard to the essential elements of this action in equity. *See Celotex Corporation v. Catrett*, 477 U.S. 317, 323 (1985). By its very nature, this motion incorporates those preliminary questions of subject matter jurisdiction and failure to state a claim upon which relief can be granted.

Plaintiffs portray the case as very simple. In an action for restitution (applying the principles of equity to avoid an unjust enrichment), plaintiffs need only establish jurisdiction to avoid summary judgment because actions in equity invariably involve genuine issues of material fact. Defendants argue that: (1) a suit by the Tribe against the State in federal court is prohibited by the Eleventh Amendment; (2) there is no federal question jurisdiction because the Tribe is attempting to apply state law; and (3) that plaintiffs cannot establish the essential elements of a claim for relief using theories of restitution because it was Westmoreland that paid the taxes, and it is Westmoreland that must recover them. The Court addresses these arguments in succession in its search for genuine issues of material fact that can prevent summary judgment.

#### A. The Eleventh Amendment Bar

Originally, the State of Montana argued that the Eleventh Amendment prohibits a suit against the State by the Crow Tribe in federal court. The basis of this argument was that the "Congress may abrogate the State's constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." *Dellmuth v. Muth*, \_\_\_ U.S. \_\_\_, 109 S.Ct. 2397, 2400, 105 L.Ed.2d 181 (1989). Based on this holding, defendant Montana argues that neither 28 U.S.C. §§ 1331 nor 1362 contain such unmistakably clear waiver language.

As acknowledged by defendants, a recent Ninth Circuit Court of Appeals case, *Native Village of Noatak v. Hoffman*, 896 F.2d 1157 (9th Cir. 1990), does include

unmistakably clear language regarding this issue. The court stated:

To recapitulate, there is no need for an explicit overriding of state immunity if the state in consenting to the Constitution has consented to be sued. The states did give consent to federal jurisdiction of Indian affairs.

*Id.* at 1172. In addition, the United States, as a plaintiff, can sue on behalf of the tribes and, when it does so, there are no longer Eleventh Amendment immunity questions that bar the parallel claims of a tribe. *Arizona v. California*, 460 U.S. 605, 614 (1983).

#### B. Federal Subject Matter Jurisdiction

Plaintiffs allege subject matter jurisdiction arising under 28 U.S.C. § 1331 (a federal question arising under the Constitution, treaties and statutes of the United States), 28 U.S.C. § 1362 (federal jurisdiction of civil matters brought by tribes arising under the Constitution, laws and treaties of the United States), and 28 U.S.C. § 1345 (federal jurisdiction over civil actions commenced by the United States or by any agency authorized to sue by Congress).

Plaintiffs have countered Montana's jurisdictional arguments at every turn. First, Montana argues that the constructive trust and *assumpsit* claims involve money paid by a third party, Westmoreland, that could not bring these claims under 28 U.S.C. 1341. *See California v. Grace Brethren Church*, 457 U.S. 393, 408, 409 (1982). Therefore, since the effect of a judgment in this case would be to discharge Westmoreland's entitlement to a

refund of taxes, this action would be void for undermining **Section 1341**. *Id.* at 408-9. The *Grace* holding, however does not control the unique jurisdictional issue presented when a quasi-sovereign tribe seeks to enjoin state taxation on tribal lands.

The **Tax Injunction Act**, 28 U.S.C. § 1341, prevents the federal courts from enjoining, suspending or restraining the assessment, levy or collection of any tax under state law where a plain, efficient, speedy remedy is available under state law. However, pursuant to 28 U.S.C. 1362, the federal courts have jurisdiction over matters brought by Indian tribes arising under the Constitution, treaties or laws of the United States notwithstanding the provisions of **Section 1341** where, as here, the United States could sue on behalf of the tribe. *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976) (regarding the tribe's action for an injunction preventing the application of a state cigarette sales tax). Therefore, the negative implications of this action on the **Tax Injunction Act** do not operate to bar jurisdiction in this limited factual circumstance.

Second, Montana argues that the cause of action in this case, restitution, is a state common law cause of action that does not involve a federal question. In order for a federal court to assume jurisdiction of a state cause of action, there must be a substantial question of federal law that is attached as an element. *Franchise Board Const. Laborers Vacation Trust*, 463 U.S. 1, 13 (1983); *Merrel Dow Pharmaceutical v. Thompson*, 478 U.S. 804 (1986). Based on these holdings, Montana argues that the Tribe has raised only state law claims that are not appropriate for establishing federal jurisdiction.

Federal jurisdiction in this matter, however, is valid for two reasons. First, it has already been established. This case is an extension of the equity jurisdiction originally invoked when this Court granted an injunction in January of 1983 preventing further direct tax payments to the State of Montana.

Second, the restitution cause of action is a federal claim that borrows its elements from state common law. *City of New Orleans v. United States*, 371 F.2d 21 (5th Cir. 1967), *cert. denied* 387 U.S. 949 (1967). The substantial question of federal law that carries with it federal question jurisdiction is whether the State of Montana has been unjustly enriched at the expense of the Crow Tribe through the collection of coal severance and gross proceeds taxes. It follows from *Crow II* and this Court's previous orders that if the State never had a valid coal tax in effect, and if the State collected taxes that would otherwise have fallen to the Tribe, then there are significant questions in equity whether the state unjustly profited at the expense of the Tribe's sovereign treaty rights and in derogation of the purposes of the **Mineral Leasing Act** of 1938. *See Crow II*, 819 F.2d 895, 898, 902 (9th Cir. 1987), *aff'd* 484 U.S. 997 (1988); Order of Sept. 11, 1988, United States District Court of Montana, CV 78-110-BLG-JFB.

The same tribal and federal interests that preempted Montana's coal tax give rise to federal jurisdiction in equity to construct a remedy that refers to state law, but is not defeated by it. In *Board of County Commissioners of Jackson County v. United States*, 308 U.S. 343 (1939), another Indian tax law case dealing with an action to recover interest in equity, the United States Supreme Court stated:

This litigation is not between the United States and a private litigant, but between the United States and the political subdivision of a state. . . . Nothing that the state can do will be allowed to destroy the federal right which is to be vindicated; but in defining the extent of that right its relation to the operation of state laws is relevant. The state will not be allowed to invade the immunities of Indians, no matter how skillful its legal manipulations. [citations omitted]. Nor are the federal courts restricted to the remedies available in state courts in enforcing such federal rights. [citation omitted]. Nor may the right to recover taxes illegally collected from Indians be unduly circumscribed by state law.

*Id.* at 350-51. The Court went on to hold that the recovery of interest was a question of simple equity that reflects the Congressional policy toward tribal economic independence and limited sovereignty. *Id.* at 352.

Having established a violation of significant tribal interests based upon treaty and federal law, this Court has broad equitable powers to construct a remedy patterned after a state common law remedy. In *City of New Orleans, supra*, the court considered a tax levied by New Orleans on equipment that, as it turned out, belonged to the federal government. The third party, Chrysler, paid state taxes on the equipment and was reimbursed by the federal government. Therefore the government was acting to collect money paid. But when the court was faced with arguments that the government had no standing because Chrysler actually paid the taxes, the court stated:

Against the inequities of such a procedural trap, we think there is ample power in the United States District Court to protect the sovereign

against such unjust enrichment on familiar principles of money had and received. [citations omitted]. This harmonizes the usual principle that Federal law fashions remedies for recovery of funds or property of the United States - including those from invalid tax exactions.

*Id.* at 28. See *Board of Comm'ners of Jackson County Kansas v. United States*, 308 U.S. 343 (1939).

Similarly, in *United States v. Broward County, Fla.*, 901 F.2d 1005 (11th Cir. 1990), the United States challenged a tax on property held in escrow until final payment was made and title had passed. Once again, the U.S. made the payments to the County, but under protest. The court held that it had subject matter jurisdiction and, in doing so, it responded to a jurisdictional argument familiar to this case -- whether an action for *assumpsit* arises only under state law within the subject matter jurisdiction of the state court. The Federal Appeals Court stated that this "misconceives the nature of the Government's claim. It was not posited upon state law, common or statutory, but upon federal law. Its action sounded in *quasi contractus* for the recovery of its treasury funds paid by mistake which resulted in the unjust enrichment of the county. . . ." *Id.* at 1007 (citing *United States v. DeKalb County*, 729 F.2d 738, 741 (11 Cir. 1984)).

Montana insists that its conflict with tribal sovereignty and the **Mineral Leasing Act** has already been remedied by *Crow II*. Since the real refund cause of action lies with Westmoreland in state court, the Tribe does not have standing to collect money that it never lost in the first place. The Ninth Circuit did state in *Crow I*, in

a footnote, that, "As to the taxes already paid by Westmoreland, however, it is true that the Tribe has not paid any of the taxes and is apparently not entitled to any refund if the tax statutes are declared invalid." *Crow I*, 650 F.2d at 1113, n. 13. An Indian tax refund case supporting this proposition is *Ute Tribe v. State Tax Comm'n, etc.*, 574 F.2d 1007, 1009 (10th Cir. 1978), *cert. denied* 439 U.S. 965 (1978). Without citation to authority concerning the construction of federal equitable remedies, the court stated:

Insofar as this action seeks to have the State of Utah return sales taxes collected by the Tribe under a generalized or lump-sum claim, it must fail as these funds now in the hands of the State were paid by the buyers of the goods and not by the sellers. If anyone can seek a recovery, or refund, it is these buyers.

*Id.*

These arguments fail in this case for two reasons. First, footnote 13 in *Crow I* must be read in conjunction with footnote 19, which speculated that there was no Crow Tribal coal tax in effect before 1982. However, based upon the holding in *Crow II* that the area known as the "ceded strip" was, at all times relevant to this action, within the Tribe's coal tax jurisdiction, and this Court's Opinion and Order stating that the Tribe had a valid tax in place between 1976 and 1982, these footnotes are inapposite. *Crow II*, 819 F.2d at 898; Opinion and Order of Sept. 11, 1988 at 7. At all times relevant to this action, the non-tribal coal taxes were preempted by the operation of tribal tax laws. Second, this is not an action for a refund.

It is an action to recover taxes that would have vested in the Tribe but for the operation of Montana law.

### C. Failure To Establish The Elements of Common Law Restitution

The elements of a federal claim for restitution are drawn in reference to state law. *Wilson v. Omaha Tribe*, 442 U.S. 653, 669 (1977). The federal court looks to state and common law for general guidance in applying an equitable doctrine. *United States v. Pegg*, 782 F.2d 1498, 1501 (9th Cir. 1986) (applying the principles of the *Restatement of Restitution* and California law on constructive trusts). If these sources allow an action in equity between sovereigns to reclaim invalidly collected taxes, then this action needs no reference to Westmoreland – it is a matter between the three sovereigns.

As argued by the defendants, the central issue in this case turns on the fact that the Tribe never paid any taxes, but could have collected them but for the operation of an invalid Montana law. In other words, does an award of restitution to prevent unjust enrichment require any sort of privity between the party enriched and the party that should have been enriched on the basis of tribal sovereignty? The *Ute* case, *supra*, seems to indicate that an action for a refund of taxes is only available where the plaintiff tribe originally paid the taxes, or at least reimbursed their payment. That decision, however, did not analyze the Montana principles of restitution allowing constructive trust and *assumpsit* remedies, nor did it analyze the purpose of the *Mineral Leasing Act*, to encourage tribal economic independence.

In Montana, an action for restitution may be maintained by one governmental entity against another even though the plaintiff is not the source of the funds. In *Valley County v. Thomas*, 97 P.2d 345 (Mont. 1939), Valley County sought restitution under theories of *assumpsit* for taxes paid by a third party to a county of the wrong jurisdiction. In responding to the argument that one county could not recover against another county for lack of privity, the court stated:

We see no reason for adopting for this jurisdiction a holding so clearly inequitable and burdensome toward the citizen; this is especially true in view of the general constitutional and legislative intent in Montana to do justice as directly as orderly processes permit, without unnecessarily circuitous, multiplicitous, or otherwise burdensome proceedings. Equity having taken jurisdiction of the injunction proceedings, there seems no reason why it should not proceed to give complete relief . . . through a money judgment.

*Id.* at 366. Similarly, other courts have dispensed with the requirement that the plaintiff must have initially paid the tax. *Humboldt Co. v. Lander Co.*, 56 P. 228 (Nev. 1899) (one county sued another for taxes paid by a property owner to the county of the wrong jurisdiction). Therefore, the retention of taxes paid to the State of Montana, like the payment itself, was without authority of law and an action for recovery need not turn on the issue of privity. See, also, *City of Norfolk v. Norfolk County*, 91 S.E. 820 (Va. 1917); and *Board of Highway Comm'rs v. Bloomington*, 97 N.E. 280 (Ill. 1912) (an unconstitutional law will not protect the receiver of funds from an action in

quasi-contract). Instead, this action for recovery of state tax funds turns upon a finding of unjust enrichment. *Midcoast Aviation, Inc. v. General Elec. Credit Corp.*, 907 F.2d 732, 743 (7th Cir. 1990).

Like actions for money had and received, Montana law provides general guidance in the application of a constructive trust. In Montana, constructive trusts arise from "fraud, mistake, undue influence, the violation of a trust or other wrongful acts." *Eckart v. Hubbard*, 602 P.2d 988, 991 (Mont. 1979). Generally, a constructive trust has the following elements:

1. a wrongful act;
2. specific property acquired by the wrongdoer must be traceable to wrongful behavior;
3. there must be a reason, in equity and fairness, why the person holding the property should not be allowed to keep it. *Alsco-Harvard Fraud Litigation*, 523 F.Supp. 790, 806-07 (D.D.C. 1981).

While Montana law provides a general point of reference in constructing a federal equitable remedy, it is not determinative, and it is certainly not exhaustive. As stated by the United States Supreme Court, "Once a right and a violation have been shown, the scope of a District Court's equitable powers is broad, for breadth and flexibility are inherent in equitable remedies." *Swann v. Charlotte Mecklenburg Board of Education*, 402 U.S. 1, 5 (1970).

The Court is bound by no unwieldy formula in constructing a remedy to neutralize an unjust enrichment, *Burgess v. Williamson*, 506 F.2d 870, 876 (5th Cir. 1975),

but it is constrained by the purposes of applicable federal law. *Snepp v. United States*, 444 U.S. 507, 510 (1979); *Amalgamated Clothing Textile Workers v. Murdock*, 861 F.2d 1406, 1411 (9th Cir. 1988) (the court constructed an equitable remedy to reflect the purposes of ERISA where the trustee of employee retirement funds violated his fiduciary duty).

The underlying federal purposes guiding the Court in this case were reviewed in *Crow II*. As stated by the Ninth Circuit Court of Appeals, the purpose of the **Mineral Leasing Act** was to "revitalize tribal governments by giving them control over the lease of their lands subject to the approval of the Secretary of Interior and to promote economic development." *Crow II*, 819 F.2d at 895. Under this statute, the Indians are to receive the "greatest return for their property." *Id.* (citing S.Rep. No. 2, H.R. Rep. No. 1872, 75th Cong., 3d Sess. 2 (1938)). In addition, the court in *Crow II* analyzed whether the state tax infringed the Tribe's interest in self government. This interest is not inviolable because "some interference with the Tribe's economic development may be justified if the State's interests in imposing the taxes are legitimate . . ." *Id.* at 903.

Citing the Tribe's N.E.R.A. economic resource study, the court rejected the State's argument that its taxes did not burden the Crow Tribe's economic interests. *Id.* at 899. As to tribal sovereignty, the court found that the state taxes were tailored far too loosely to allow such an incursion into tribal government. *Id.* at 903. Consequently, from the inception of a valid Crow coal tax in 1976, the State's coal taxes on the "ceded strip" were preempted.

The findings of economic and governmental encroachment relied upon by the Court to support preemption under federal law, however, are necessarily distinguishable from those supporting a remedy for restitution. For instance, the court in *Crow II* found that the State did provide certain unquantified benefits to the Tribe, including a fund to handle the environmental cost associated with strip coal mining. *Id.* at 901. For the purposes of federal preemption, the State failed to establish that its taxes were narrowly tailored to legitimate state interests. *Id.* at 903. While the court in *Crow II* found no reason to further quantify the contributions of the state tax fund to tribal services, these issues are of great interest to this Court when balancing the equities of unjust enrichment.

To construct an equitable remedy promoting the Crow Tribe's interest in economic independence without unjustly enriching the Tribe requires a balancing of the enrichment received by both parties. The object of this endeavor is not necessarily to remove all benefit to defendant, but to remove the amount of enrichment that plaintiff can establish as unjust. *Midcoast Aviation*, 907 F.2d at 745. To prevail, the Tribe must "show that the possessor [of coal severance taxes] will give offense to equity and good conscience if permitted to retain it." *Atlantic Coast Line Railroad Co. v. State of Florida*, 295 U.S. 301, 309 (1934). In this endeavor, the court of equity must determine if there are offsetting equities that affect the level of unjust enrichment retained by the defendant. *McDonalds Corp. v. Moore*, 237 F.Supp. 874, 877 (W.D.S.C. 1965).

It is axiomatic that equitable remedies cut both ways. Remedies for restitution may include direct decrees in

equity, or may be calculated through set-offs and counterclaims. **Rest. Restitution §4** (1936).<sup>1</sup> It is a question of fact where the equities lie in this case. See *McDonalds*, 237 F.Supp. at 879. More fundamentally, it is a question of fact whether a remedy in restitution arises at all in this case. *Burgess*, 506 F.2d at 876.

The court of equity must consider and balance such equitable facts as the amount of money collected by the State, whether the Tribe would have collected similar amounts but for the State tax, the amount of money that the State channeled to services enriching the Tribe, and so on. Only upon inspecting the field of countervailing equities can the Court, in fairness and good conscience, impose upon the State of Montana a decree in equity to release coal severance tax funds.

Similarly, the issue of interest in this case is not determined with empirical formulas. An award of interest depends upon where the equities lie. *McDonalds*, 237 F.Supp. at 879; *United States v. Sanborn*, 135 U.S. 271, 281 (1890) (interest denied upon finding that the United States sat on its rights and failed to offer a reasonable excuse); *Board of Commissioners*, 308 U.S. at 350 (interest denied because its extraction would be inequitable).

The Crow Tribe has properly invoked subject matter jurisdiction in this proceeding in equity. However, the amount or type of equitable relief, if any, is entirely a point of speculation before the Court can review and

<sup>1</sup> Set-offs and counterclaims in equity are governed by the same principles as set-offs and counterclaims in contract law. **Rest. Restitution § 149** note.

weigh the equitable facts pertaining to both the Crow Tribe and the State of Montana. Until the Court can make a complete finding of the equitable facts, there are genuine issues of material fact prohibiting summary judgment.

## II.

### AMENDMENT OF PLAINTIFF- INTERVENOR'S COMPLAINT

Finally, the U.S. moves to amend the complaint to include a prayer for interest that parallels the provision that was amended into the Tribe's complaint. The State opposes this motion on the grounds that summary judgment will dispense with the case. They would have the Court hold the matter in abeyance pending the decision on the summary judgment motion. Based upon the preceding discussion, amendment is a live issue. Pursuant to **Fed.R.Civ.P. 15 (a)**, this Court finds that justice requires an alignment of pleadings between the United States and the Crow Tribe based upon their trust relationship in this case.

Accordingly,

#### IT IS ORDERED:

1. Defendant's motion for summary judgment is denied.
2. The Clerk of Court is directed to file the plaintiff-intervenor United States' First Amended Complaint.
3. A status conference in this action will be conducted at the hour of 1:30 o'clock p.m. on the 24th day of

App. 86

January, 1991, in the Chambers of the undersigned, Federal Building, Billings, Montana. The purpose of this conference will be the scheduling of further proceedings in this matter.

The Clerk of Court shall forthwith notify the parties of the making of this order.

DONE and DATED this 26th day of December, 1990.

/s/ Jack D. Shanstrom  
United States District Judge

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App. 87

SUPREME COURT OF THE UNITED STATES  
OFFICE OF THE CLERK  
WASHINGTON, D. C. 20543

January 11, 1988

Mr. Michael T. Greely  
Attonrye [sic] General of Montana  
Justice Bld., 215 Sanders  
Helena, MT 59620-1401

Re: Montana, et al.,  
v. Crow Tribe of Indians, et al.  
No. 87-343

Dear Mr. Greely:

The Court today entered the following order in the above entitled case:

The judgment is affirmed. The Chief Justice would note probable jurisdiction and set the case for oral argument.

Very truly yours,

Joseph F. Spaniol, Jr., Clerk  
/s/ Joseph F. Spaniol, Jr.

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**The CROW TRIBE OF INDIANS; Forest Horn, a member of the Crow Tribe and Chairman of Crow Tribal Council; Ted Hogan, a member of the Crow Tribe and Secretary of the Crow Tribal Council; Jiggs Yellowtail, a member of the Crow Tribe; Barney Old Coyote, a member of the Crow Tribe, Plaintiff-Appellant,**

**United States of America,  
Plaintiff-Intervenor,**

**v.**

**STATE OF MONTANA,  
Defendant-Appellee.**

**The CROW TRIBE OF INDIANS,  
Plaintiff-Appellant,**

**and**

**United States of America,  
Plaintiff-Intervenor-Appellant,**

**v.**

**The STATE OF MONTANA,  
Defendant-Appellee,**

**and**

**Westmoreland; Westmoreland,  
Westmoreland Resources, Inc.,  
Defendant-Intervenor-Appellee.**

**Nos. 86-3842, 86-3845.**

**United States Court of Appeals,  
Ninth Circuit.**

**Argued and Submitted April 6, 1987.**

**Decided June 11, 1987.**

Indian tribe brought action against Montana, seeking declaratory and injunctive relief against imposition of the state's severance and gross proceeds taxes on coal belonging to the tribe. The District Court, 469 F.Supp. 154, dismissed. The tribe appealed. The Court of Appeals, 650 F.2d 1104, reversed and remanded. On remand, the District Court, District of Montana, James F. Battin, Chief Judge, 657 F.Supp. 573, upheld application of taxes to coal mined from certain area and abstained from deciding whether taxes could be imposed on coal mined on the reservation proper. The tribe appealed. The Court of Appeals, Eugene A. Wright, Circuit Judge, held that: (1) Montana's taxes were preempted by federal law and policy; (2) the taxes were void for infringing on tribal sovereignty; and (3) question concerning whether taxes could be applied to coal mined on the reservation proper presented justiciable controversy.

Reversed.

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Clay R. Smith, Helena, Mont., and John W. Ross, Billings, Mont., for defendant-appellee.

Gerald B. Murphy, Billings, Mont., and William A. White, Philadelphia, Pa., for appellees.

Daniel M. Rosenfelt, Albuquerque, N.M., for plaintiffs-appellants.

N. Jean Bearcrane, Billings, Mont., for appellant.

Laura E. Frossard, Washington, D.C., for plaintiff-intervenor-appellant.

Appeal from the United States District Court for the District of Montana.

Before BROWNING, WRIGHT, and HALL, Circuit Judges.

EUGENE A. WRIGHT, Circuit Judge:

This case, which comes before us a second time, presents two primary issues: (1) does federal action preempt the application of Montana's coal taxes to coal mined on Indian tribal property; and (2) do these taxes infringe unlawfully on the Crow Indians' tribal sovereignty? We answer both questions in the affirmative and reverse the judgment of the district court.

#### PROCEDURAL HISTORY

This is an appeal by the Crow Tribe, with the United States intervening on behalf of the Tribe, from a district court judgment upholding the application of Montana taxes on coal extracted from tribal land. The district court abstained from deciding whether the taxes could be imposed on revenues from coal mined on the reservation proper. It found that issue nonjusticiable.

The Crow Tribe brought action against Montana in 1978, joining three Montana counties and their treasurers. That action sought declaratory and injunctive relief against the imposition of the state's severance and gross proceeds taxes on coal mined from the reservation and what has been referred to as the "ceded strip."

The district court dismissed that action for failure to state a claim. *Crow Tribe of Indians v. Montana*, 469 F.Supp. 154 (D.Mont.1979). This court reversed and remanded.

*Crow Tribe of Indians v. Montana (Crow I)*, 650 F.2d 1104 (9th Cir.1981), *amended*, 665 F.2d 1390 (1982). We indicated that if the Tribe could show that the Montana taxes deprived it of "a large portion of the economic benefits of its coal," *Crow I*, 650 F.2d at 1113, or "diminish[ed] the Tribe's own power to regulate," *id.* at 1114, these taxes would conflict with federal statutes that were intended to allow Crow to regulate the development of its natural resources. Our decision provided, however, that if Montana showed that these taxes were "carefully tailored to effectuate the state's legitimate interests, [they] might survive." *Id.*

Upon remand, the district court upheld the application of Montana taxes to coal extracted from the "ceded area" and abstained from deciding whether the taxes could be imposed on revenue from coal mined on the reservation proper, 657 F.Supp. 573.

#### FACTS

In 1904, Congress enacted legislation requiring the Crow Tribe to cede to the United States its interests in the surface area and underlying minerals of a portion of its reservation ("the ceded strip"). Act of April 27, 1904, Ch. 1624, 33 Stat. 352; *Little Light v. Crist*, 649 F.2d 682, 685, 689 (9th Cir.1981). The United States was to hold in trust for Indians the surface area and underlying mineral rights to the ceded strip. The United States was to sell the property and pay the proceeds to the Indians. *Id.* Approximately 98% of the surface area of the "ceded strip" was conveyed to non-Indians.

The government conveyed ceded strip properties in different forms: (1) rights to both the surface area and underlying minerals and (2) rights to the surface area only. A portion of the ceded strip was never conveyed, leaving both the surface area and underlying mineral interests in a trust held by the United States for the benefit of the Crow Tribe.

In 1934, Congress enacted the Indian Reorganization Act (IRA), 25 U.S.C. §§ 461-479 (1982), which returned to the various tribes previously ceded lands and underlying minerals. The Act transferred ownership rights from the United States back to the Indians. The tribes involved could choose to accept or decline the arrangement. Crow declined.

In 1958, Congress passed another Indian Restoration Act, which *required* Indians to accept ownership of vacant lands ceded previously. It restored the previously undisposed minerals to the *full* beneficial ownership of the Crow Tribe. This terminated the United States' right to lease or sell these minerals for the Tribe. The parties agree that the Tribe *owns* these minerals underlying the ceded area, but whether they are now part of the Crow reservation is disputed.

In 1972, the Tribe leased to Westmoreland Resources the rights to mine coal underlying the ceded strip. The surface area of the leased land had been sold to non-Indians. Rights to the underlying minerals had not been conveyed. Such leasing activity is governed by the Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-g (1982), and regulations promulgated thereunder.

In 1975, Montana imposed two taxes on all coal producers. The first was a severance tax, "imposed on each ton of coal produced in the state." Mont.Code Ann. § 15-35-103 (1985). The rate varies from three to 30% of the coal's value, depending on quality and whether the mining is on the surface or underground.

The second tax is the gross proceeds tax, imposed on each person engaged in coal mining. Mont.Code Ann. § 15-23-701. The rate is determined by applying the relevant county's property tax to the assessed value of the coal producer's gross yield from coal contract sales. The amount varies by county and year.

Between 1975 and 1982, Westmoreland paid \$53,800,000 in severance taxes and \$8,100,000 in gross proceeds taxes for its ceded strip mining operations. Westmoreland has since paid \$20,000,000 on these taxes to the district court registry.

In 1976, the Tribe imposed its own severance tax of 25% for coal mined on the reservation. In 1982, it enacted a similar tax for coal mined on the ceded strip. The Department of Interior rejected the latter tax because the Crow constitution disclaimed tribal jurisdiction over the ceded strip. In 1982, Westmoreland agreed to pay the tribal tax, but received credit for the coal taxes paid to Montana. Hence, it has paid no severance tax to Crow.

Interior approved the application of Crow severance taxes to coal produced on the reservation proper. In 1980, Shell Oil and Crow agreed to a lease contract for mining coal on the reservation. It required Shell to pay Crow an amount equal to the Montana coal taxes less whatever was required to be paid to the state.

Shell never began to mine, being unwilling to begin digging because it was unable to find a buyer for its coal. It surrendered its rights to the mine in December 1985.

## DISCUSSION

### I. Preemption

The district court found that the minerals underlying the ceded strip were technically outside the reservation boundaries. It held that tribal activities conducted outside the reservation "present different considerations" than do activities conducted within. "'Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State.'" (Quoting, *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49, 93 S.Ct. 1267, 1270, 36 L.Ed.2d 114 (1973)). The district court stated also that, in order for the taxes to be preempted, there would have to exist federal legislation that "expressly bars . . . Montana . . . from imposing its coal taxes." It found no express federal prohibition against the taxes and, therefore, held they were *not* preempted.

The court erred in these findings and in the conclusions of law, which we review de novo. *United States v. McConney*, 728 F.2d 1195 (9th Cir.) (en banc), cert. denied, 469 U.S. 824, 105 S.Ct. 101, 83 L.Ed.2d 46 (1984). The district court's legal conclusions deviate from this court's 1981 opinion and misapply recent Supreme Court cases that establish the relevant preemption analysis. We found, contrary to the district court, that the underlying minerals are a "component of the reservation land itself."

*Crow I*, 650 F.2d at 1117. This follows the plain meaning of the 1958 Act, which restored to reservation status all lands returned to tribal ownership under the Act.

Title to the lands restored to tribal ownership by this Act shall be held by the United States in trust for the respective tribe or tribes, and such lands are hereby added to and made part of the existing reservations for such tribe or tribes.

Act of May 19, 1958, 72 Stat. 121.<sup>1</sup>

The law of the case as expressed in our previous opinion has been ignored. We held in *Crow I* that, irrespective of the location of the tribal coal on or off the reservation, the Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396g (1982), applied to the Tribe's coal leases. *Crow I*, 650 F.2d at 1114 n. 16.

The preemption analysis in Indian tribal cases differs from that used in other circumstances. *Crow I*, 650 F.2d at 1109 (citing *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 140, 149, 100 S.Ct. 2578, 2581, 2586, 65 L.Ed.2d 665 (1980)); see also *Ramah Navajo School Board v. Bureau of Revenue*, 458 U.S. 832, 838, 102 S.Ct. 3394, 3398, 73 L.Ed.2d 1174 (1982). Congress attaches great significance to the "firm federal policy of promoting tribal self-sufficiency and economic development." *Crow I*, 650 F.2d at 1109 (quoting *Bracker*, 448 U.S. at 140, 100 S.Ct. at 2581); see also *California v. Cabazon Band of Mission Indians*, \_\_\_ U.S. \_\_\_ 107 S.Ct. 1083, 1092, 94 L.Ed.2d 244 (1987); *New Mexico v.*

<sup>1</sup> The 1958 Act does not give the Tribe jurisdiction over the surface of the ceded strip. The Act restored only the mineral interests to tribal ownership. These interests were once part of the reservation and remain adjacent to it.

*Mescalero Apache Tribe*, 462 U.S. 324, 334-35, 103 S.Ct. 2378, 2386-87, 76 L.Ed.2d 611 (1983). It intended that this policy be given "broad preemptive effect." *Crow I*, 650 F.2d at 1109. Moreover, "[n]o express congressional statement of preemptive intent is required; it is enough that the state law conflicts with the purpose or operation of a federal statute, regulation, or policy." *Id.* (emphasis added).

We have already indicated that the purpose of the 1938 Act was, *inter alia*, to revitalize tribal governments by giving them control over the lease of their lands subject to the approval of the Secretary of Interior, and to promote tribal economic development. *Crow I*, 650 F.2d at 1112-13; see also *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 767 n. 5, 105 S.Ct. 2399, 2404 n. 5, 85 L.Ed.2d 753 (1985) (a major purpose of the 1938 Act is "to ensure that Indians receive 'the greatest return from their property'") (quoting S.Rep. No. 2, H.R.Rep. No. 1872, 75th Cong., 3d Sess. 2 (1938)).

If the Tribe demonstrates that the taxes imposed by the state interfered with the policies underlying the 1938 Act, the taxes will be subject to preemption. *Crow I*, 650 F.2d at 1113; see also *Cabazon*, 107 S.Ct. at 1092.

#### A. Interference with Tribal Economic Interests

We review for clear error the district court's finding that the Montana taxes did not interfere with federal or tribal court policies. Fed.R.Civ.P. 52(a); *LaDuke v. Nelson*, 762 F.2d 1318, 1321 (9th Cir.1985).

The district court did not find that the taxes interfered with federal Indian law and policies. Rather, it

found that Westmoreland's marketing problems were due to a decrease in coal demand from Montana's traditional coal buyers.

Montana argues that its taxes do not burden Crow's economic interests because the Tribe itself does not pay the tax. In other words, the taxes were imposed on the lessee, Westmoreland, and the Tribe had no duty to reimburse. So, says Montana, the Tribe's economic interests were not affected.

We have already rejected this argument. *Crow I*, 650 F.2d at 1113 n. 13. The state taxes increase the costs of production by the coal producers, reducing in turn the royalty that can be paid the Tribe. The taxes also forced the coal producers to charge higher prices, reducing the demand for their Montana coal and resulting in fewer sales for the producers and fewer royalties to the Tribe.

Montana argues that it may impose these taxes under *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980). *Colville* held that the state could tax cigarettes purchased by non-Indians at tribal smokeshops. *Id.* at 161, 100 S.Ct. at 2085. Principles of preemption and tribal self-government do not authorize Indian tribes to "market an exemption from state taxation to persons who would normally do their business elsewhere." *Id.* at 155, 100 S.Ct. at 2082.

But the Court has distinguished *Colville* from cases in which the Tribe was trying to market a product generated on the reservation by activities in which the Tribe had a strong interest. See *Cabazon*, 107 S.Ct. at 1093-94. In *Cabazon*, the Court held that state regulation of Indian-run bingo games was preempted by federal action. *Id.* at

1092-95. Unlike the tobacco sold in *Colville*, bingo was not a product that the Indians imported for resale to non-Indians. *Id.* at 1093.

The Indians had invested considerable time and resources into the enterprise. *Id.* at 1094. The tribes there were "generating value on the reservations through activities in which they have a substantial interest." *Id.* The Court in *Cabazon* explicitly noted that this was *not* the case in *Colville*. The tribes were merely marketing their exemption from state cigarette taxes. *Id.* at 1093.

Clearly, this case resembles *Cabazon* more than it does *Colville*. The coal is the Tribe's property, a natural resource. Its lease brings revenue that represents value generated by tribal activities and in which the Tribe has a substantial interest. *Colville* does not apply.

We should consider the economic aspects and the practical effects of Montana's severance and gross proceeds taxes.<sup>2</sup>

The Tribe cites a study prepared by an economic research firm, referred to as the NERA report. It showed that the Montana coal tax forced coal producers to raise coal prices. That resulted in reduced demand for Montana coal. Montana's customers stopped buying from Montana producers and went to Wyoming and other

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<sup>2</sup> Figures submitted by the Crow Tribe tell us that the Montana taxes totalled an effective rate of 32.9%, more than twice that of any other state's coal taxes. Montana counters that the effective rate is 21-22%. It appears that experts for the parties reached different results because they used different methods of calculating the effective tax rates.

states that have lower coal taxes. The report says that in 1975, before the taxes were imposed, Montana accounted for 40.6% of the Northern Great Plains coal output. Wyoming produced 43.8%. In each subsequent year, Montana has lost, while Wyoming has gained, in the percentage of this region's coal production. By 1982, Montana produced 18.2%, and Wyoming 69.5%, of the region's coal output.

Production by the coal producers on Crow tribal properties fell from 7.4 to 2.78% during that time. The NERA report concluded that the taxes prevented Crow coal from competing with that of Wyoming and resulted in far less Crow coal production than would have otherwise occurred.

Montana counters that the NERA report is unreliable. It refers to testimony that the report was "grounded on a supply [and] demand theory which failed to consider adequately the myriad of factors influencing a [buyer's] determination to use certain coal." Montana's expert accounted for the differences in production by noting Wyoming coal's lower sulfur content, and the increased population in Wyoming's traditional buyer markets. Further, says Montana, the taxes when factored into total coal sales constituted only one to three percent of the price.

Montana places some emphasis also on the cost of coal transportation and says that, for distances of more than 1,100 miles, it costs less to ship Wyoming coal than it does Montana coal. This had a far greater impact on price than did the taxes, Montana argues.

From all of this, one must conclude that the taxes imposed are the components that differ most clearly

between Montana and Wyoming. The timing of the loss in coal production in Montana and the losses sustained by the Crow Tribe correspond exactly with the imposition of taxes. The district court erred in relying on transportation costs. Coal production from areas in Montana just across the Wyoming border decreased after the taxes were imposed, while the Wyoming production experienced a large increase.

Montana has failed to rebut evidence that the taxes had at least some negative impact on the coal's marketability. The district court did not find the impact of taxes to be negligible. As long as the taxes "interfere[ ] or [are] incompatible with federal and tribal interests reflected in federal law," they are deemed preempted "unless the state interests at stake are sufficient to justify the assertion of state authority." *Cabazon*, 107 S.Ct. at 1092 (quoting *Mescalero*, 462 U.S. at 333-34, 103 S.Ct. at 2386). Any finding of interference, then, would be enough to subject the state taxes to preemption. This record shows interference. The district court erred in failing to so find.

#### B. Legitimacy of State Interests

If the state coal taxes conflict and interfere with federal or tribal objectives, we must review the legitimacy of the state's interests, and the relationships of the taxes to achieving those interests. *Crow I*, 650 F.2d at 1113-14; see also *Bracker*, 448 U.S. at 148-49, 100 S.Ct. at 2586 (to justify its assessment of taxes, state must identify a regulatory function or a service it performs).

We have identified interests that we thought might justify these taxes: (a) the additional government services required by miners and others involved in coal production; and (b) the costs of treating the pollution and solid waste disposal that attend coal production. *Crow I*, 650 F.2d at 1114.

The district court found that Montana and its political subdivisions provided numerous services to the ceded strip. It held that the costs of these services could not be documented precisely and were unquantifiable. The court said that many of coal mining's effects were unknown: "[f]or example, reclamation is not yet complete and its degree of success is uncertain." The court said that some of coal mining's effects could be identified if not precisely quantified, e.g., air and water pollution, soil and plant damage, harmed wildlife, and road wear. It noted also the socioeconomic effects of the Westmoreland mine, particularly the disruption in the lives of those living on the ceded strip. The court observed that the burden of providing services had fallen upon state and local governments, not upon the Tribe.

These findings are correct, says Montana. It cites expert testimony that the appellant's NERA report failed to consider environmental and other long term consequences of coal development. Montana contends that it is not necessary to account for all the economic and social factors in setting its tax rate.

The state cites *The Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 101 S.Ct. 2946, 69 L.Ed.2d 884 (1981), which on its face seems to apply. But there the issue was

whether a state's coal severance tax violated the Commerce or Due Process Clauses because the amount of tax revenues was not "fairly related" to the government services required by coal mining. *Id.* at 620, 101 S.Ct. at 2955. That analysis differs from the one used to determine whether state actions affecting Indians are preempted by existing federal policy. In denying Montana's petition for rehearing in the previous appeal, we rejected expressly *Commonwealth Edison. Crow Tribe v. Montana*, 665 F.2d 1390, 1391 (9th Cir.1982) (amending *Crow I*).

We held that the preemption analysis requires a court to consider the state's legitimate interests. Ultimately the question is one of reviewing the state, federal, and tribal interests involved and whether, in this context, the state action is contrary to federal action.

In *Cabazon*, the Supreme Court stated that "the federal tradition of Indian immunity from state taxation is very strong and . . . the state interest in taxation is correspondingly weak. Accordingly, it is unnecessary to rebalance these interests in every case." 107 S.Ct. at 1091 n. 17 (emphasis added). The Supreme Court has increased the presumption against finding legitimate state interests. Hence, even if we agree with the district court that Montana taxes support legitimate interests, the interests described in *Crow I*, and argued by Montana, may no longer be sufficient.

The Court found in *Cabazon* that:

[t]he tribal [bingo] games at present provide the sole source of revenues for the operation of the tribal governments and the provision of tribal services. They are also the major sources of

employment on the reservations. Self-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members. The Tribes' interests obviously parallel the federal interests.

*Id.* at 1093.

The same may be said here. Coal production is vital to the economic development of the Crow Tribe. Like the bingo games, Crow's coal leases "generate funds for essential Tribal service and provide employment for Tribal members." *Id.* at 1094.

Given the significance *Cabazon* attaches to these federal and tribal interests, Montana faces a heavy burden in overcoming these with a showing of legitimate state interests. Even if Montana's interests are sufficiently legitimate, there is substantial evidence that the coal taxes are not narrowly tailored to support them.

### C. Relationship Between Taxes and State Interests

The district court was unable to quantify or forecast the current or future costs resulting from coal development. It ignored hard evidence. The NERA report concluded that from 1970 to 1982, population growth associated with coal mining resulted in \$38 million of government costs. But for that period, state, local, and excise taxes, *other than the coal taxes*, provided state and local governments with \$42 million.

There may be additional costs associated with treating the environmental consequences of coal production,

but the state failed to provide a specific figure. Instead it would charge a heavy tax for indeterminable future costs, imposing on the Tribe the burden of the doubt.

It appears further that many of these environmental concerns have been addressed already by federal and state regulations. Montana's environmental interests are protected by the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1201, *et seq.* (1982), which imposes surface mine bonding and reclamation fee requirements. *Id.* at §§ 1258, 1269. EPA and state programs carefully regulate point source discharge from the mines.

The district court found that state taxes were narrowly tailored to achieve legitimate interests. This is undermined by Montana's use of these tax revenues. The severance tax statute requires that 50% of the revenues be allocated to a permanent trust fund and, according to the NERA report, 19 to 30% to the state general fund. Mont.Code Ann. § 15-35-108 (1985). These two funds are not dedicated to environmental or coal-related services. The three coal-related funds established by the severance tax statute were to be initially allocated 31% of the severance tax revenues. As of 1981, they received only 8.75%. This indicates a distant, rather than carefully tailored, relationship between the severance tax revenues and the coal-related services.

It appears that Montana intended, at least to some extent, to use the taxes to profit from the Indians' valuable coal resources:

[t]he Montana legislature predicated its tax upon a finding that strip coal 'is in sufficient demand that at least one-third of the price it

commands at the mine may go to the economic rents of royalties and production taxes.' . . . Mont.Code Ann. § 15-35-101(1)(e). By setting the severance tax rate at 30 percent of value, Montana made plain its intention to appropriate most of the economic rent.

*Crow I*, 650 F.2d at 1113. We stated that the Tribe's coal "is not the state's to regulate. . . . it has no such legitimate interest in appropriating Indian mineral wealth." *Id.* at 1114.

Accordingly, even if we assume Montana's interests were legitimate, the district court clearly erred in finding that the taxes were narrowly tailored to achieve them. Montana coal taxes are preempted.

## II. Tribal Sovereignty

The district court concluded as a matter of law that the Montana taxes do not infringe on tribal sovereignty. It reasoned that the application of the state's coal taxes to tribal coal mined in the ceded area did not infringe upon tribal self-government because the coal lay outside the reservation. It erred in this conclusion because the minerals underlying the ceded area are owned by the Tribe and are considered part of the Crow Reservation. See *Crow I*, 650 F.2d at 1117.

The self-government doctrine differs from the preemption analysis and is an independent barrier to state regulation. *Bracker*, 448 U.S. at 142-43, 100 S.Ct. at 2583; *Crow I*, 650 F.2d at 1110. Either is a sufficient basis to hold the state tax inapplicable to tribal coal. *Bracker*, 448 U.S. at 143, 100 S.Ct. at 2583.

Whether the state taxes infringe on tribal sovereignty depends on whether tribal self-government is affected. *Crow I*, 650 F.2d at 1116. The power to tax members and non-Indians alike is an essential attribute of self-government. *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195, 201, 105 S.Ct. 1900, 1904, 85 L.Ed.2d 200 (1985). Any assertion of state authority over tribal interests must be assessed against the traditional notions of Indian sovereignty. *Mescalero*, 462 U.S. at 334, 103 S.Ct. at 2386. State action may not infringe unlawfully "on the right of reservation Indians to make their own laws and be ruled by them." *Bracker*, 448 U.S. at 142, 100 S.Ct. at 2583 (quoting *Williams v. Lee*, 358 U.S. 217, 220, 79 S.Ct. 269, 271, 3 L.Ed.2d 251 (1959)).

Tribal sovereignty contains a significant geographical component, and tribes have the power to manage the use of their territory and resources by both members and nonmembers. *Mescalero*, 462 U.S. at 335, 103 S.Ct. at 2387; *Bracker*, 448 U.S. at 151, 100 S.Ct. at 2587. Taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation is not permissible absent congressional consent. *Cabazon*, 107 S.Ct. at 1091 n. 17 (citing *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973)).

While the federal tradition of Indian immunity from state taxation is very strong, *see id.*, this court has recognized that a state tax is not invalid merely because it deprives the Tribe of revenues used to sustain itself and its programs. *Crow I*, 650 F.2d at 1116. The principle of tribal self-government is to seek "an accommodation

between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other." *Colville*, 447 U.S. at 156, 100 S.Ct. at 2082.

Montana taxes mineral resources that are "a component of the reservation land itself." *Crow I*, 650 F.2d at 1117. The tax revenue from coal production could generate funds for tribal services and provide employment for tribal members. *Mescalero*, 462 U.S. at 341, 103 S.Ct. at 2390. By taking revenue that would otherwise go towards supporting the Tribe and its programs, and by limiting the Tribe's ability to regulate the development of its coal resources, the state tax threatens Congress' overriding objective of encouraging tribal self-government and economic development. *See Mescalero*, 462 U.S. at 341, 103 S.Ct. at 2390; *Bracker*, 448 U.S. at 149, 100 S.Ct. at 2586. While some interference with the Tribe's economic development may be justified if the state's interests in imposing the taxes are legitimate, *Crow I*, 650 F.2d at 1113; *Colville*, 447 U.S. at 163, 100 S.Ct. at 2086, the State has not shown that its taxes are narrowly tailored to meet these interests. We conclude that the Montana tax is invalid because it erodes the Tribe's sovereign authority.

### III. Coal Within Reservation Boundaries

The district court declined to rule whether the taxes applied to coal mined within the external boundaries of the reservation. Although Shell Oil Company had an agreement with the Tribe to mine this coal, it never did so. Because of that, the district court found there was no substantial controversy with this issue.

We disagree. The Tribe need not wait for mining to commence to challenge the taxes' application to coal mined within the Reservation boundaries. See *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298, 99 S.Ct. 2301, 2308, 60 L.Ed.2d 895 (1979) (it is not necessary to await the consummation of a threatened injury to obtain preventive relief); *State of Arizona v. Atchison, Topeka, & Santa Fe R.R. Co.*, 656 F.2d 398, 402-03 (9th Cir. 1981) (court may enter declaratory judgment as to validity of tax even though action is commenced prior to the effective date of the tax scheme).

The taxes are already in effect and Montana intends to apply them to this coal. These high taxes affect tribal revenues by interfering with the Tribe's coal leasing efforts. Because of the taxes, the lessee cannot find a buyer, making it difficult for Crow to find a lessee.

These taxes burden the Tribe's interests in coal within the Reservation boundaries, just as they do its interests in coal from the ceded strip, as these interests are the same. The reasons for disallowing these taxes on coal from the ceded strip apply with equal force to the coal within the Reservation boundaries.

## CONCLUSION

Montana's coal taxes are preempted by federal law and policies. They interfere with tribal economic development and autonomy. The state interests they promote may or may not be sufficiently legitimate to overcome these conflicts, but even if they are, the taxes are not narrowly tailored in pursuit of these interests.

In addition, the taxes are void for interfering with tribal self-government, a separate and independent barrier to state regulation of Indian affairs. The mineral estate of the ceded strip is legally part of the Crow reservation, and taxing Indian income derived from activities conducted on reservation property is prohibited without congressional consent. Here, Congress did not consent. Montana's interests in imposing the coal taxes do not overcome the tribe's economic and governmental interests in coal production.

Finally, because taxes on coal mined on the ceded strip are invalid, taxes on coal from the reservation proper are likewise invalid. The district court erred in holding this question nonjusticiable. The taxes impair the tribe's ability to negotiate leases with Shell Oil and other coal companies. They also reduce tribal revenues by impairing the coal's marketability.

REVERSED.

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**The CROW TRIBE OF INDIANS,  
et al., Plaintiffs,**

**v.**

**UNITED STATES of America, et al.,  
Plaintiff-Intervenor,**

**v.**

**STATE OF MONTANA: Ellen Feaver,  
Director, Montana Department of  
Revenue; Big Horn County, Montana;  
Yellowstone County, Montana; Treasure  
County, Montana; Lorraine Hamilton,  
Treasurer, Big Horn County, Montana;  
May Jenkins, Treasurer, Yellowstone  
County, Montana, Claribel Bonine,  
Treasurer, Treasure County, Montana,  
Defendants.**

**Westmoreland Resources, Inc.,  
Defendant-Intervenor.**

**No. CV-78-110-BLG.**

**United States District Court,  
D. Montana,  
Billings Division.**

**Sept. 10, 1985.**

Crow Indian tribe filed civil action challenging validity of Montana coal severance and gross proceeds taxes and seeking various forms of relief. The District Court, 469 F.Supp. 154, dismissed suit. On appeal, the Court of Appeals, 650 F.2d 1104, reversed and remanded. The federal government and coal producer intervened. On remand, the District Court, Battin, Chief Judge, held that: (1) no case or controversy existed warranting declaration

as to validity of tax with respect to coal mined on reservation, and (2) taxes were valid insofar as applied to production of coal held by United States in trust for Crow tribe on ceded strip of land, as taxing statutes were not preempted by 1938 Indian Mineral Leasing Act or regulations promulgated thereunder, did not violate right of tribal self-government, and did not impermissibly burden interstate commerce or tax tribal trust property.

Ordered accordingly.

Reversed, 9th Cir. 819 F.2d 895.

Francis X. Lamebull, Harlem, Mont., for plaintiffs.

David W. Hoefer, Deputy Yellowstone Co. Atty., Billings, Mont., James E. Seykora, Big Horn Co. Atty., Hardin, Mont., James R. Carlson, Jr., Treasure Co. Atty., Hysham, Mont., for counties.

Jerome Anderson, John Ross, Anderson Law Firm, Billings, Mont., Chris Tweeten, Asst. Atty. Gen., Helena, Mont., Helena S. Maclay, Deidre Boggs, Missoula, Mont., for State of Mont.

Byron H. (Pete) Dunbar, U.S. Atty., Billings, Mont., Steven E. Carroll, Asst. Atty. Gen., Land & Natural Resources, Washington, D.C., for U.S.

George Miller, Dechert, Price & Rhoads, Philadelphia, Pa., R.H. Bellingham, Moulton Law Firm, Billings, Mont., Daniel Israel, Cogswell & Wehrle, Denver, Colo., for Westmoreland.

# FINDINGS OF FACT AND CONCLUSIONS OF LAW

BATTIN, Chief Judge.

Plaintiff, the Crow Tribe of Indians, has filed this civil action challenging the validity of the Montana Coal Severance Tax and the Montana Gross Proceeds from Coal Tax insofar as these taxes are applied to coal produced on the Tribe's reservation and to coal produced on a ceded strip of land situated adjacent to the reservation. The Tribe seeks injunctive, declaratory, restitutionary, tax and money refunds, money damages, and other relief. Although this Court and the Court of Appeals considered the tax with respect to mining on both locations on a motion to dismiss, the evidence at trial led this Court to conclude that there is no case or controversy with respect to coal mined on the reservation. *See infra* Conclusion of Law II. The following findings, therefore, focus on coal mined on the ceded strip.

This matter came on for trial before the Court, sitting without a jury, on January 9, 1984. The plaintiff was represented by counsel Robert S. Pelcyger and Dale T. White of Boulder, Colorado. Defendants were represented by counsel Jerome Anderson and John W. Ross of Billings, Montana, Assistant Attorney General Chris D. Tweeten of Helena, Montana, Treasure County Attorney James R. Carlson, Jr., of Hysham, Montana, Big Horn County Attorney James E. Seykora of Hardin, Montana, and Yellowstone County David W. Hoefer of Billings, Montana. Defendant-intervenor Westmoreland Resources, Inc., was represented by Gerald B. Murphy of

Billings, Montana, and Daniel H. Israel of Denver, Colorado. The plaintiff-intervenor United States was represented by Department of Justice attorney Stephen E. Carroll. From the testimony and evidence submitted by the parties and the briefs and arguments of counsel, the Court now makes the following Findings of Fact and Conclusions of Law.

# FINDINGS OF FACT

## Parties

1. The plaintiff, Crow Tribe of Indians, is an American Indian tribe, with the governing body, the Crow Tribal Council, duly recognized by the United States Secretary of the Interior as the governing body of the Crow Indian Reservation.

2. The defendant State of Montana is a sovereign state of the Union, pursuant to the Enabling Act of February 22, 1889, 25 Stat. 676. Defendants Big Horn County, Yellowstone County, and Treasure County are political subdivisions of the State of Montana. Defendant Hamilton is Treasurer of Big Horn County; defendant Jenkins is Treasurer of Yellowstone County; defendant Bonine was Treasurer of Treasure County.

3. Defendant-Intervenor Westmoreland Resources, Inc., is a Delaware corporation having its principal place of business at Billings, Montana.

*Ceded Strip – Creation and Description*

4. The Crow Reservation was first set apart by the Treaty of Fort Laramie, 11 Stat. 749 (1851), and encompassed 38.5 million acres in what is now southern Montana and northern Wyoming. The second Treaty of Fort Laramie, entered into in 1868, 15 Stat. 649, reduced the Crow Reservation to 8 million acres situated entirely within what is now the State of Montana. The 1868 treaty set apart the reservation for the absolute and undisturbed use and occupation of the Crow Tribe. *Montana v. United States*, 450 U.S. 544, 547-48, 101 S.Ct. 1245, 1249, 67 L.Ed.2d 493 (1981).

5. The 1868 treaty was followed by three major cessions of territory by the Crow Tribe: the Act of April 11, 1882, 22 Stat. 42, the Act of March 3, 1891, 26 Stat. 989, and the Act of April 27, 1904, 33 Stat. 352. The third, 1904, cession reduced the Crow Reservation to its present boundaries and created the "ceded strip," an area consisting of about 1,137,500 acres which lies to the north of the acknowledged reservation.

6. Large deposits of coal underly both the Crow Reservation proper and the ceded strip.

7. Most of the surface in the ceded strip is owned in fee by non-Indians.

8. The ceded area has a population of approximately 4600. Approximately 1% of the population is Indian.

9. The ceded area has been developed by non-Indians pursuant to state and county governmental law and regulation.

10. Land use within the ceded strip is primarily range land, irrigated cropland, hay land, pasture, forest cover, and non-irrigated cropland. Rural residential housing is located throughout the ceded strip.

11. The ceded strip includes one incorporated municipality, numerous unincorporated communities, a variety of special districts, and public school districts which are governed by state law.

12. The ceded area is not a legally constituted political subdivision of the State of Montana, but it lies within the boundaries of Big Horn, Treasure, and Yellowstone Counties. It does not conform to any political or administrative boundaries for which any economic or demographic data are normally collected. It receives full governmental representation in accordance with state law. This ceded area is located in the Thirteenth and Sixteenth Judicial Districts of the District Courts in the State of Montana.

*Ownership of Coal Underlying the Ceded Strip*

13. In 1904, the Crow Tribe ceded "all right, title, and interest" in the area presently referred to as the ceded strip. Act of April 27, 1904, 33 Stat. 352. The United States agreed to act as trustee for the Tribe, to dispose of the ceded lands under the various reclamation, homestead, and mineral laws, and to pay the Indians the proceeds of the sales. See 33 Stat. at 361. The Indians released their possessory right to the ceded strip lands but retained a beneficial interest in the undisposed-of ceded lands. See *Ash Sheep Co. v. United States*, 252 U.S. 159, 40 S.Ct. 241, 64 L.Ed. 507 (1920).

14. In accordance with the 1904 Cession Act, lands within the ceded strip were disposed of by the United States. Under § 5 of the Act, the State of Montana received sections 16 and 36 for the support of common schools. 33 Stat. at 360. Some allotments to individual Indians were made under § 4. 33 Stat. at 358-59. The remaining lands in the ceded strip were opened to homestead entries. Under § 5, lands were offered for settlement for the price of \$4 per acre. The lands that could not be sold for this price were to be offered for sale at a lesser price under such presidential proclamations as were deemed necessary. Further dispositions were made under a number of presidential proclamations. *See* May 24, 1906, 34 Stat. 3200; September 9, 1910, 36 Stat. 2742; August 9, 1912, 37 Stat. 1759; September 28, 1914, 38 Stat. 2029; and April 6, 1917, 40 Stat. 1653.

15. Under the 1904 Act and these various proclamations, a considerable amount of both surface land and mineral estate was conveyed to non-Indians. A few thousand acres of surface lands were never conveyed. The patents issued to non-Indians for approximately 70,000 acres of coal lands expressly excluded rights to the underlying minerals in favor of the United States.

16. In 1934, Congress enacted the Indian Reorganization Act (IRA). 25 U.S.C. § 461 et seq. Under § 3 of the IRA, 25 U.S.C. § 463(a), the Secretary of the Interior was authorized to restore to tribal ownership "the remaining surplus lands of any Indian reservation opened before June 18, 1934. . . ."

17. Three months after the IRA's enactment, in September 1934, the Secretary temporarily withdrew the surplus or open Indian lands that the United States had been authorized to sell as trustee or broker for Indian tribes. 54 I.D. 559 (1934). This Secretarial Order expressly withdrew the previously undisposed-of surface lands and minerals in the Crow ceded area. *Id.* at 561-63.

18. The Secretarial Order terminated, at least temporarily, leasing by the federal government of the previously undisposed-of minerals within the ceded area pursuant to the mineral leasing laws governing public lands. In due course, the surplus or ceded lands, including previously undisposed-of mineral interests, of tribes that elected to accept the IRA were restored to tribal ownership. *See, e.g.*, 59 I.D. 393 (1947); 60 I.D. 174 (1948).

19. The Crow Tribe elected not to accept the provisions of the IRA. *See* 25 U.S.C. § 478. Consequently, these surplus or ceded lands were not restored to tribal ownership under 25 U.S.C. § 463.

20. The Act of May 19, 1958, Pub.L. No. 85-420, 72 Stat. 121, provided

[t]hat all lands now or hereafter classified as vacant and undisposed-of ceded lands (including townsite lots) on the following named Indian reservations are hereby restored to tribal ownership subject to valid existing rights:  
 . . . Crow, Montana - 10,260.95 [acres] . . . *Provided*, That such restoration shall not apply to any lands while they are within reclamation projects heretofore authorized.

Sec. 2. Title to the lands restored to tribal ownership by this Act shall be held by the United

States in trust for the respective tribe or tribes, and such lands are hereby added to and made a part of the existing reservations for such tribe or tribes.

Sec. 3. The lands restored to tribal ownership by this Act may be sold or exchanged by the tribe, with the approval of the Secretary of the Interior.

21. The two major purposes of the 1958 Act, as revealed by its legislative history, were to treat non-IRA tribes in a similar manner as IRA tribes with respect to ceded or surplus lands and to restore to tribal ownership all the surface lands and mineral interests that were withdrawn from entry by the Secretarial Order (54 I.D. 559 (1934)). S.Rep. No. 1508 (85th Cong., 2d Sess. 1-2, 2-3 (1958); H.Rep. No. 1336, 85th Cong., 2d Sess. 1-2 (1958)). Both committee reports state:

This legislation, if enacted, will restore the lands [temporarily withdrawn by, *inter alia*, the September 1934 Order] to tribal ownership, thus terminating the right of the Federal Government to dispose of them under the cession statutes, and will assure the Indians the continued use rights.

*Id.* The reports expressly refer to the Secretarial Order which withdrew the previously undisposed-of ceded surface lands and mineral interests.

22. If the ceded strip minerals in which the Crow Tribe retains a beneficial interest were not restored to full tribal ownership by the 1958 Act, the Crow Tribe would not receive the same treatment as the tribes whose lands and minerals were restored under § 3 of the IRA, 25

U.S.C. § 463. *See* 60 I.D. 174 (1948); 59 I.D. 393 (1947). Similarly, excluding the Tribe's ceded strip minerals from the coverage of the 1958 Act would conflict with that Act's express purpose of fully restoring to tribal ownership all of the surface lands and minerals that had been temporarily withdrawn in September 1934.

23. No significance can be attached to the use of the term "vacant and undisposed-of ceded lands" in the 1958 Act instead of the "surplus lands" language from § 3 of the IRA. *See* 25 U.S.C. § 463. The legislative history discloses why different language was used in these similar Acts.

24. S. 1757, the bill introduced by Senators Murray and Mansfield, and H.R. 3490 and H.R. 6160, predecessor bills introduced by Representative Metcalf, had used the phrase "surplus ceded lands of the class mentioned in the Indian Reorganization Act of June 18, 1934, Section 3 (48 Stat. 984; 25 U.S.C. § 463)" in § 1 of the bills to describe the lands that would be restored to tribal ownership. In its comments on these bills, the Interior Department recommended that the lands be described instead "as vacant and undisposed of ceded lands" in order to "avoid the necessity for a cross reference" to the IRA. The Interior Department's report expressly stated that the recommended change "relate[d] to matters of form and do[es] not affect the substance of the bill." S.Rep. No. 1508, at 3; H.Rep. No. 1336, at 3.

25. The 1958 Act was intended to, and did in fact, fully restore the previously undisposed-of minerals in the Crow ceded strip to the full beneficial ownership of the Crow Tribe. The right and power of the United States to

lease or sell those minerals was terminated. This Court expressly so held in *Redding v. Morton*, CV-74-12-BLG (D.Mont.1974):

In 1958, Congress restored to the Crow Tribe all of the undisposed of lands in the ceded area. 72 Stat. 121 (1958). The Interior Department has interpreted this series of enactments and case law to mean that the Crow Tribe owns all of the coal underlying the surface within the ceded area. Consequently, it must be concluded that the Crow Tribe was never divested of its title to coal which was not conveyed when the United States disposed of the surface land.

*Id.*, Slip Op. at 8. The Court of Appeals did not reach the merits of the title question in the appeal of the *Redding* case. *Cady v. Morton*, 527 F.2d 786, 791, 798 (9th Cir. 1975).

26. The Act of August 14, 1958, 72 Stat. 575, amended the 1958 Act by authorizing the purchase by the federal government of the Tribe's right to some 4900 acres within the ceded area included within the Huntley Reclamation Project. The effect of the August 1958 Act was to reduce the surface lands restored under the May 1958 Act to approximately 5360 acres. S.Rep. No. 1508, at 4-5. A provision in the August 1958 Act evidences Congress' intent to restore minerals in the ceded strip to the Crow Tribe. § 1 of the August 1958 Act provides for the Tribe's retention of the minerals underlying these 4900 acres, and § 2 of that Act, 72 Stat. at 582, states "that the minerals reserved for the benefit of the Crow Tribe pursuant to Section 1 hereof shall be leased or otherwise disposed of under the laws and regulations relating to Indian trust lands."

27. The Department of the Interior has consistently treated the undisposed-of lands and minerals in the ceded area as being held in trust for the Crow Tribe. In a circular issued to explain the application of the Act of February 27, 1917, 39 Stat. 944, one of the Acts which permitted entry of the surface estate and reservation of the mineral estate, the General Land Office recognized that the Tribe retained a beneficial interest in the minerals after the surface estate was conveyed. Exhibits introduced at trial also showed that the Bureau of Indian Affairs has consistently treated the undisposed-of minerals as being held in trust for the Tribe.

28. There is a clear, consistent, and contemporaneous administrative construction by the Interior Department that the undisposed-of minerals underlying the Crow ceded area were restored to full tribal ownership by the 1958 Act. See Exhibits 97, 87, D-435, 128.

29. Both the Crow Tribe and Westmoreland Resources have relied on this consistent administrative interpretation. This reliance is manifested by an investment of tens of millions of dollars in a coal mine.

#### *Surface Coal Mining on the Ceded Strip*

30. In June 1972, Westmoreland, a non-Indian company, entered into two leases with the Crow Tribe to mine coal underlying about 31,000 acres of the ceded strip. One of these leases, encompassing over 16,000 acres, was cancelled in 1982 by mutual consent of Westmoreland, the Tribe, and the federal government. The second lease remains in effect and authorizes production of coal on Tract III which is located in Big Horn County on the

ceded strip in sections 25, 26, and 36, Township 1 North, Range 37 East.

31. In 1974, Westmoreland's leases were amended to reflect a renegotiation and consequent increase in the Tribe's royalty rate. Agreement was also reached to renegotiate the royalty rate in ten years to a point at or about the prevailing market rate.

32. The coal leases and subsequent amendments were the result of arm's-length negotiations between Westmoreland, the Tribe, and the federal government. The leases and amendments were subject to federal approval and were approved by the Secretary of the Interior. The Tribe was free to accept or reject the terms of the agreements.

33. In October 1972, Westmoreland began construction of its "Absaloka Mine" on Tract III. Mine facilities were built on the lease tract, and a 36-mile railroad spur line was built along Sarpy Creek to connect the minesite with the Burlington Northern line in Treasure County, Montana.

34. Surface coal mining operations at Westmoreland's Absaloka Mine commenced in Spring of 1974. Production reached 4 million tons in 1975 and has remained relatively constant, reaching a peak of 4.9 million tons in 1979 and declining since 1981. Under long-term sales contracts entered into in 1974, Westmoreland annually ships approximately 4 million tons of coal to four mid-west utilities. Such deliveries are to continue through 1993.

### *Surface Coal Mining on the Crow Indian Reservation*

35. Although negotiations have taken place between the Crow Tribe and various mining companies, and some preliminary prospecting and exploration has been accomplished, no actual mining of coal by non-Indian lessees has occurred within the boundaries of the Crow Indian Reservation.

36. In April 1983, the Secretary of the Interior approved a 1980 coal mining agreement between the Crow Tribe and Shell Oil Company for a coal tract situated in the extreme southeastern corner of the Crow Reservation immediately north of the Wyoming border. Shell has not mined coal on the reservation nor does it have any current long-term contracts to sell reservation coal.

### *Governmental Services and Jurisdiction on the Ceded Strip*

37. Since 1904 the State of Montana and its political subdivisions have had legal authority and responsibility for the provision of public services on the ceded strip. The state and its political subdivisions exercise exclusive jurisdiction on the ceded strip.

38. Public services provided by the state and local governments to the ceded strip include general government services, public safety, health and welfare, natural resources, public works, transportation, recreation, and culture and education.

39. The state makes available services to and exercises jurisdiction over the counties containing the ceded strip and the ceded strip itself in the same manner as it

would for all other counties, or portions thereof, within the state. The state provided specific evidence that at least 11 public agencies of the state are involved in various governmental activities on the ceded strip. These state agencies include: the Department of Agriculture; Department of Commerce; Department of Fish, Wildlife, and Parks; Department of Highways; Department of Justice; Department of Health; Department of Labor; Department of State Lands; the Montana State Library; Department of Natural Resources and Conservation; and the Department of Public Service Regulation. This list does not represent the entirety of state involvement in governmental activities on the ceded strip.

40. The total cost of these services cannot be precisely documented. The state's budgeting process is a complex, interrelated system, and it is not appropriate to look at one or a few components of that system in isolation. The budgetary process is not designed to identify all monies expended in response to a certain area or taxpayer or recipient. The budgetary process and accounting system is not designed to trace funds from a taxpayer to an expenditure.

41. Big Horn, Treasure, and Yellowstone Counties have historically provided and continue to provide, numerous and various services to the ceded strip. County and local governments have jurisdictional authority on the ceded strip.

42. Throughout the ceded strip, law enforcement is provided by the counties. In some cases law enforcement is provided by a consolidated city/county law enforcement agency. A courthouse building is located in the

county seat of each County to provide administrative facilities for the function of general government in the ceded strip. The counties provide recreational facilities as well as health and welfare, library, emergency medical, and fire-fighting services. The ceded area is completely encompassed within the elementary and secondary school districts in the three counties. The extent and cost of these facilities and services are substantial as evidenced by both the value of physical assets and the budgets of the counties.

43. There are approximately 105 miles of Federal Interstate Highway, 45 miles of state primary and secondary highways, and 600 miles of paved and unpaved county roads located on the ceded strip. The county governments of Big Horn, Treasure, and Yellowstone have responsibility for paved and unpaved roads and bridges.

44. The county seat of Big Horn County is located in Hardin, Montana. The city of Hardin was specifically excluded from the Crow Indian Reservation in 1937. Act of August 31, 1937, 50 Stat. 884. Hardin provides numerous services to and is impacted by activities on the ceded strip as evidenced by its budgets. Big Horn County budgets on a county-wide basis for all necessary public services, including road construction, maintenance, and improvements, provisions for health and welfare services, fire, ambulance and police protection, and all normal incidental requirements of county services. Big Horn County operates a hospital and nursing home located in Hardin. Big Horn County has exclusively provided these services to the portion of the ceded strip in Big Horn County to the exclusion of the Crow Tribe and the Bureau

of Indian Affairs. Examples of general governmental activities provided by Big Horn County within the ceded strip include functions of the County Commissioners' office, the County Assessor, the Clerk and Recorder, Treasurer, County Clerk, Justice of the Peace, County Attorney, and County Extension Office.

45. There are 202 miles of road responsibility located on the ceded strip in Big Horn County. The Big Horn County government is the only governmental agency which maintains and repairs state secondary highways within the county. Neither the Bureau of Indian Affairs nor the Crow Tribe contributes to the maintenance of state secondary highways on the ceded strip.

46. Big Horn County, to the exclusion of the Crow Tribe and the Bureau of Indian Affairs, has fought all fires on the ceded strip in Big Horn County.

47. Big Horn County provides substantial education facilities and services on the ceded strip. High School District No. 1 is located partly on the ceded strip.

48. Treasure County is the exclusive provider of police services, judicial services, and general governmental services in that part of the ceded strip located in Treasure County, including district court, juvenile court, fire protection services, ambulance services, road and bridge construction and repair, a medical clinic, sanitary landfill services, all schools and related services, and through interlocal agreement with Rosebud County, services of the county to indigents.

49. The fire service and ambulance service are manned by volunteers who receive either no compensation or nominal compensation.

50. A large majority of the population in Treasure County resides on the ceded strip.

51. Treasure County's total budget has increased nearly fivefold since 1970 while tax revenue has only doubled. Treasure County has deleted or reduced services as a result, specifically deleting all library services, all mental health services, and delaying or postponing bridge repair, road maintenance, and construction. In recent years, Treasure County has levied the legal maximum rate for its general governmental levy, and since 1975 it has levied the legal maximum rate for the road and bridge funds.

52. Treasure County has approximately 11,000 acres of non-fee patent lands located on the ceded strip for which it receives no tax revenues or payments in lieu of taxes from the federal government, the Crow Tribe, or any other government. Treasure County provides all governmental services, including fire protection, law enforcement, and the other services for these lands.

53. Yellowstone County provides a full range of governmental services which are available to residents on that portion of the ceded strip within Yellowstone County. Yellowstone County maintains about 335 miles of roads in the ceded area. It also maintains seven parks located within the ceded area in Yellowstone County.

54. The Crow Tribe provides little or no governmental services to the ceded strip, and it has not exercised and does not exercise general civil jurisdiction in the ceded area. Neither the Crow Tribe nor the Bureau of Indian Affairs provides fire protection, roads, police, or other governmental services on the ceded strip. None of the Crow Tribe's ordinances apply on the ceded area, and in its constitution the Tribe has disclaimed jurisdiction outside of the boundaries of its reservation.

*Jurisdiction and Services Related to Coal Mining on the Ceded Strip*

55. Coal mining has an extensive, pervasive effect, both direct and indirect, on state and local government. The state and county governments provide numerous facilities, assistance, and services, to coal mining, which enable coal development everywhere in the state to occur in an orderly manner. The costs of these facilities, assistance, and services are difficult to document and quantify in their entirety, but the total cost is substantial.

56. State government is affected both in specific service provisions and general governmental activities by coal development occurring anywhere in the state including areas affected by the Westmoreland mine. The state government incurs costs in responding specifically to coal mining activities, both on and off the ceded strip, and to incremental demands placed on the government by coal development. Organizations and people associated with coal development have access to and utilize the entire array of state governmental activities, including those provided by the judicial, legislative, and executive branches.

57. The state and its political subdivisions had responsibility for and incurred the costs of developing and maintaining the governmental and physical infrastructure that allowed development of coal on the ceded strip. Westmoreland Resources has utilized and had the advantage of various services, facilities, or governmental structures that were in place when its mining activities commenced. These services, facilities, and governmental infrastructures were developed, maintained, and financed at substantial cost by the state and local governments.

58. It is not possible to identify and quantify the total extent of coal-related demands on or use of state services generally, or Westmoreland's demands on or use of state services. The state and the ceded strip counties have provided extensive services to and regulated the ceded strip and the Westmoreland mine. There are numerous examples demonstrating that such services are extensive and substantial. For example, the Montana Department of Commerce, which administers the Montana Coal Board grants, has made numerous grants to the area affected by Westmoreland's mining operation. The Montana Department of Health and Environmental Sciences inspects the Westmoreland Mine at least five times annually and has provided operational assistance for sewer lagoons in communities near the Westmoreland Mine. The Montana Department of Highways has constructed and maintained highways in the vicinity of the Westmoreland Mine. The Department of Justice has provided highway patrol and fire marshal activities in the vicinity of the Westmoreland Mine. The Montana Department of Labor and Industry has provided safety and

health inspections at the Westmoreland Mine and provides the unemployment and workman's compensation programs for employees at the Westmoreland Mine.

59. Governmental services used by and available to the Westmoreland Mine are indistinguishable in form from those available to other mines operating in Big Horn County and elsewhere in Montana.

60. With regard to mining and reclamation at Westmoreland's Mine; Montana has historically taken the lead and continues to take the lead and do the bulk of the regulatory work. Westmoreland's Mine is regulated in the same manner as any other surface coal mine in Montana.

61. The Montana legislature has enacted numerous mining and reclamation requirements at the insistence of its citizens. Westmoreland's mining operation has been developed and conducted pursuant to Montana's mining and reclamation and environmental requirements.

62. Numerous state permits and approvals may be required in conjunction with coal mining. The State of Montana and its political subdivisions have issued a number of permits and approvals for the Westmoreland Mine.

63. The Montana Department of State Lands has issued numerous permits and prepared several environmental impact statements on the Westmoreland Mine. The Department also reviews and inspects the Westmoreland Mine on a regular basis, and it has issued a number of notices of violation to Westmoreland.

64. The Montana Department of State Lands, even after the passage of the Federal Surface Mining Control

and Reclamation Act (SMCRA), still has the primary role with regard to regulation of mining and reclamation at Westmoreland's Mine.

65. The Crow Tribe does not have an approved mining and reclamation program which applies to the ceded area. SMCRA provides that before Indian tribes may become eligible to administer a mining and reclamation program, Congress will have to amend SMCRA, and Indian tribes will have to take various actions before the tribes can be eligible and can implement a mining and reclamation program. Neither Congress nor the Crow Tribe have taken these necessary actions.

66. The Crow Tribe does not have jurisdiction to provide services on the ceded strip. The Tribe has not provided and will not provide services to the Westmoreland Mine.

67. The roles of the federal government and the Crow Tribe with regard to coal development are limited to leasing and monitoring of production. The role of the BIA is limited primarily to receiving payments and determining how much coal is mined. The BIA responsibilities with regard to the Westmoreland Mine do not extend beyond those in the lease.

70. The only functions performed by the Crow Tribe or the BIA on the ceded strip relate to the Tribe's status as royalty owner and not to its status as sovereign. Because the Crow Tribe is not responsible for governmental services associated with coal development in the ceded strip, its interest in the ceded strip is limited to the interests of any other coal lessor.

*Impacts of Surface Coal Mining on the Ceded Strip*

71. In addition to responsibility for providing the infrastructure which enables coal development in the state, and more particularly on the ceded area, to occur, and for responding to ongoing administrative and service demands from Westmoreland's and others' mining activity in Montana, the state and its political subdivisions have jurisdiction over, and thus responsibility for, responding to deleterious socioeconomic, political, and governmental consequences of coal mining.

72. Impacts of coal mining are characterized by a boom and bust cycle.

73. The effects and impacts of coal mining and related activities are not limited to direct impacts of mining or mine-related activities themselves. Environmental and socioeconomic effects occur which are geographically disbursed and indirectly related to project activities but which nevertheless have the potential to require state and local governmental response.

74. An important function of state government is to assume responsibility for responding to unforeseen effects of activities such as coal mining. Despite all efforts to anticipate serious adverse effects, and despite permitting and bonding requirements, the risks of significant, costly, unforeseen effects still exist. It is the responsibility of the state to obtain compensation for assuming these risks on behalf of the state's citizens.

75. The impacts caused by coal mining and related activities, including impacts from the Westmoreland Mine, can only be partially identified and documented at

this time. Significant problems of measurement and quantification prevent an accurate and complete estimation of many of those impacts. Many of the effects and costs associated with coal mining are currently unknown. For example, reclamation is not yet complete, and its degree of success is uncertain.

76. Some impacts and effects of coal mining can be currently identified, but it is difficult to quantify precisely and entirely the costs and impacts associated with a particular coal mine. The nature of the effects of coal mining do not allow such complete quantification, and governmental accounting systems are not designed to track service provisions or utilizations by geographic area, taxpayer, or purpose.

77. The land ownership patterns, and the distribution of environmental and socioeconomic effects of coal mining, particularly at Westmoreland's mine on the ceded strip place the responsibility and burdens for response to these effects on state and local governments, in a manner similar to that of other coal mining activities in Montana.

78. Because few Crow Indians live on the ceded strip, the Tribe has a limited interest in insuring that the environment of the ceded strip and the public services available on the ceded strip are protected and maintained.

79. There is no evidence that the Crow Tribe provides any response to the impacts from mining on the ceded area.

80. Impacts from Westmoreland's mine are both socioeconomic and environmental. Some have occurred or will occur in the short term, and others will occur after a longer period of time. Some have occurred or will occur in the immediate vicinity of the mine, including the ceded strip, and others have occurred or will occur statewide.

81. Certain environment impacts can be measured, identified, and associated with the Westmoreland Mine at this time. For example, Westmoreland's mining activity has increased and will continue to increase the concentration of air borne particulates and other pollutants. There are surface and ground water effects or potential effects associated with Westmoreland's mine which may be substantial but which may not be known for a relatively long time. The Westmoreland Mine has short-term and perhaps long-term effects on soils, vegetation, and wildlife. Because reclamation at the Westmoreland Mine has only occurred over a relatively short time, it is too soon to determine what the effects of the Westmoreland Mine will be on vegetation. The effects on wildlife caused by the Westmoreland Mine depend significantly on long-term results of reclamation.

82. The Westmoreland Mine has caused impacts on state and county roads in the area requiring construction of certain roads and increased maintenance to others.

83. The socioeconomic effects of the Westmoreland Mine are also difficult to identify and document in their entirety at this time. The state of Montana and its political subdivisions, however, have incurred the major socioeconomic burdens associated with the Westmoreland Mine and assumed the risk for further adverse impacts.

For example, most of the employees at the Westmoreland Mine live off the reservation, primarily in Hardin, Montana. The Westmoreland Mine has also indirect socioeconomic effects in other areas of Montana, including Big Horn, Yellowstone, and Treasure Counties.

84. There have been substantial impacts upon residents of Big Horn and Treasure Counties as a result of the Westmoreland Mine arising from the construction of the railroad spur to that mine, increased rail traffic, and increased vehicle traffic. These impacts caused changes in the life-styles of the local residents, and many have not been compensated by Westmoreland, the Tribe, or the United States.

85. There are timing and jurisdictional mismatches of revenues and demands resulting from the Westmoreland Mine. For example, Treasure County has experienced impacts from the Westmoreland Mine to its county roads, law enforcement, and other programs which have not been offset by property or gross proceeds taxes from the Westmoreland Mine.

86. The responsibilities to respond to effects of the Westmoreland Mine to date have fallen upon the state and county governments and not upon the Crow Reservation or Crow Tribe.

#### *Leasing of Tribally-Owned Coal - The 1938 Act*

87. The development of minerals held by the United States in trust for the Crow Tribe on the ceded strip, at least after 1968, has been subject to the provisions of the 1938 Indian Mineral Leasing Act (1938 Act), 25 U.S.C. § 396a-396g.

88. The leasing activity with regard to coal located in the ceded area, including the lease issued to Westmoreland for Tract III, has taken place under the 1938 Act and the regulations promulgated under that Act, 25 C.F.R. § 211.1-.30 (1983).

89. Crow coal can now also be developed pursuant to the Indian Mineral Development Act of 1982, 25 U.S.C. § 2101, et seq. The only actual development of Crow-owned coal, however, has taken place under the authority of the 1938 Act.

90. Westmoreland's lease was issued under the 1938 Act.

*The Need for Revenues on the Crow Reservation*

91. Evidence presented at trial showed that there are enormous unmet needs on the Crow Indian Reservation for additional revenues to fund essential governmental programs and services for the Crow people in the areas of housing, health, employment, land acquisition, law enforcement, welfare, and education. While some of the witnesses whose testimony concerned the needs of the Crow people sought amounts of funding that might be difficult to attain even in prosperous areas, all of the witnesses identified basic needs in their specialty areas that the Crow Tribe, even with federal and state assistance, is unable to provide due to insufficient revenues.

92. Revenues gained from the development of tribally-owned coal reserves, through taxation, royalty collection, or by any other legally-sanctioned means, could significantly assist the Tribe in developing a more effective tribal government and a stronger economic base.

*Montana's Coal Taxes*

93. In 1975, Montana enacted statutes that impose on coal mine operators a severance tax on each ton of coal produced in the state and a gross proceeds tax on the sale of each ton of coal produced in the state. Mont.Code Ann. §§ 15-35-101 to 111 (1983) and §§ 15-23-701 to 704 (1983).

94. The Montana Coal Severance Tax, Mont.Code Ann. § 15-35-103, is "imposed on each ton of coal produced in the State." "Produced" means "severed from the earth." Mont.Code Ann. § 15-35-102. The tax is measured by the value of the "contract sales price" of the coal which is defined as "the price of coal extracted and prepared for shipment f.o.b. mine, excluding that amount charged by the seller to pay taxes paid on production. . . ." Mont.Code Ann. § 15-35-102. The statutory rate of tax varies from 3 to 30% of the value of the coal, depending upon the heating quality of the coal and the method by which it is mined. Mont.Code Ann. § 15-35-103.

95. Montana's coal taxes are paid quarterly by the producers, Mont.Code Ann. § 15-35-104, who then pass them forward to their utility company customers according to the terms of their coal contracts.

96. Montana has made provision for the disposition of funds gained through the coal severance tax. Mont.Code Ann. § 15-35-108. The major recipient is a permanent trust fund which was approved as a constitutional amendment by referendum. Mont. Const. Art. IX § 5. The purpose of the constitutional trust fund is to address environmental and socioeconomic impacts which may arise in the future and which may be consequences of the cessation of large-scale coal mining in Montana.

The trust fund contains only moneys collected pursuant to the coal severance tax. The principle of the fund may only be invaded on a three-fourths vote of the Montana Legislature. The Legislature may, however, appropriate the interest income earned by the fund. Approximately 25% of the coal severance tax moneys collected between July 1, 1977, and December 31, 1979, were allocated to the trust fund; 50% of the collections after that date go into the fund.

97. The remaining severance tax moneys are allocated to a variety of uses. The two largest uses are a "local impact and education trust fund account," which has received between 18 and 28% of the severance tax revenues, and the state's general fund, which has received between 19 and 40% of severance tax revenues. The remaining revenues have gone to state equalization aid to public schools, a coal area highway improvement fund, archeological preservation, various cultural projects, park acquisition and management, an alternative energy research fund, the general funds of the counties where the coal is mined, county land use planning, and a sinking fund servicing renewable resources development bond accounts. Mont.Code Ann. § 15-35-108.

98. The Gross Proceeds from Coal Tax is imposed on "each person engaged in mining coal." Mont.Code Ann. § 15-23-701. Each person mining coal must file with the State Department of Revenue an annual report that must include, among other things, a statement of the number of "tons of coal extracted, treated, and sold from the mine during the taxable period" and "the gross yield or value in dollars and cents derived from the contract sales

price." *Id.* The Department of Revenue transmits the valuation of the gross proceeds of the mine to the county assessor of each county in which the coal mines are located. Mont.Code Ann. § 15-23-702. The county assessor then enters the value on the assessment role, *id.*, and transmits a tax assessment to the county treasurer, who collects the taxes due from the coal operator. Mont.Code Ann. § 15-23-703.

99. The gross proceeds tax enacted in 1975 is substantially a reenactment of the net proceeds tax on coal at substantially the same effective rate. The net proceeds tax was first enacted in 1981. The tax generates revenue for the counties, school districts, and other local taxing entities. The rate of the gross proceeds tax is set by the local taxing entities' mill rate which is dependent upon revenue needed to operate.

100. All of the benefits of governmental services resulting from Montana's coal taxes are available to all citizens, including members of the Crow Tribe.

101. Montana's coal tax allocation structure has made it possible to make grants to communities located within the boundaries of the Crow Reservation, as evidenced by a number of Coal Board grants to the communities of Lodge Grass and Wyola, provisions in the Montana coal tax law specifically identify Indian tribes as being eligible for coal board grants.

102. Impact moneys are available from the state to aid in mitigating impacts occurring on the reservation from coal mining on the ceded strip.

*History of the Coal Tax and its Legislative Justification*

103. Montana's coal taxes were influenced by Montana's history of boom and bust in the mineral industry, the apparent coal boom in Montana in the early 1970's, and Montanans' desire and the Montana constitutional obligation that resource development within Montana occur without harm to the residents and environment of the state.

104. Coal tax bills were introduced in the 1973 Montana Legislature. None passed, and the legislature established an interim legislative fossil fuel study committee. The interim study committee conducted extensive studies, held public hearings, conducted extensive investigation regarding coal sales and coal taxes, and considered the short and long term impacts of coal mining. The committee reported its findings and proposed severance and gross proceeds tax legislation. After extensive debate, the legislature overwhelmingly enacted Montana's current coal taxes.

105. As stated in the April 16, 1975, "Statement to Accompany the Report of the Free Joint Conference Committees on Coal Taxation:"

In setting the level of the tax, the conference committee looked at the needs to be met. The objectives were to (a) preserve or modestly increase the revenue going to the general fund, (b) to respond to current social impacts attributable to coal development, and (c) to invest in the future, when new technologies reduce our dependence on coal and mining activity may decline. The conference concluded that a severance tax of 20% on low grade lignite and 30% on

other coal, plus a gross proceeds tax running at around 4-5% on all coal, was necessary and equitable.

*Id.* at 1.

106. The Montana Legislature was aware of the potential impacts and costs of mining when debating Montana's coal severance and gross proceeds taxes. The legislature believed that other environmental laws would not prevent or remedy all impacts and costs of coal mining and that a tax on coal operators was therefore necessary. Legislators supporting the coal severance and gross proceeds taxes were determined to have coal development pay its own way.

107. Because demands for services can occur both before mining operations begin and after they cease, the legislature took the position that reasonable and prudent response to large scale coal development required the establishment of a taxing and administrative structure that (1) collected adequate resources to cover current and future costs, (2) compensated the state and local jurisdictions for assuming the risk associated with these responsibilities, and (3) is flexible enough to address the issues of jurisdictional and temporal mismatch and cumulative effects. State taxing policy required that any tax levied also have uniform application, be efficient to collect, and provide a stable revenue flow.

108. The structure of Montana's coal severance tax and the distribution of coal severance tax revenues reflects the intent of the legislature to meet the needs of Montana with respect to coal mining. The structure of the tax was designed to:

- (a) Allow the severance taxes on coal production to remain a constant percentage of the price of coal;
- (b) stabilize the flow of tax revenue from coal mines to local governments through the property taxation system;
- (c) simplify the structure of coal taxation in Montana, reducing tax overlap and improving the predictability of tax projections;
- (d) accomplish the foregoing purposes by establishing categories of taxation which would recognize the unique character of coal.

Mont.Code Ann. § 15-35-101(2) (1983). The severance tax rates imposed were derived by the coal tax oversight committee based on its best estimate of the short and long-term costs to the state from coal mining.

109. Montana's coal taxes were not designed to prohibit coal development, but were designed to promote orderly development which would protect the environment and the interests of Montanans and to make coal development pay its fair share. A proposed moratorium on coal development in the 1974 Montana Legislature was defeated.

110. Montana's coal taxes were not designed to capture maximum economic rents or excess profits. The Montana Legislature recognized that coal development would place a variety of demands on state and local government and would benefit from the trained work force and organized society that resulted from state and local government activities. The legislature also recognized that large scale coal development imposed a risk of

environmental impact on state and local governments, on surface owners, and on all residents of the state.

111. Montana's coal severance tax was designed to address some of the major problems associated with coal development. Tax revenues were intended to provide front end financing to communities and agencies faced with rapid increases in demands for various services. Severance tax revenues are and will continue to be used to remedy problems created by jurisdictional mismatches. Severance tax revenues are also set aside for the future and will be used to respond to problems, both foreseen and unforeseen, that will arise when coal mining operations cease.

112. The Montana Legislature and the interim coal committee have the Montana severance and gross proceeds taxes under continuous review, and all citizens and coal companies are given periodic opportunities to express their views on the appropriateness of the Montana coal taxes.

#### *The Crow Tribe's Coal Severance Tax*

113. On January 31, 1976, the Crow Tribe enacted its own coal severance tax code to tax coal mined on the reservation at a statutory rate of 25%.

114. In July 1982, the Tribe enacted a new code providing for taxation on the ceded strip. The 1982 severance tax code has not been approved by the Secretary of the Interior for enforcement on the ceded strip. The Secretary has withheld approval because the Tribe lacks the

power under its constitution to levy a tax off its reservation and because the Secretary has not determined whether such power exists as a matter of federal law.

115. Any tribal tax revenue is subject to future allocation. The Tribe's tax is a general revenue tax, and the Tribe makes no claim that it would be used to offset reservation or ceded strip impacts resulting from coal mining. The Tribe has no statutory provision to allocate coal development funds to mitigate impacts or provide coal mining-related services on the ceded strip.

116. Presently, about 60% of the revenue obtained by the Crow Tribe from coal development goes to per capita distribution to tribal members.

117. Because there has been no actual mining of coal by lessees on the reservation, no revenues have been collected under the Tribe's severance tax code. The Tribe's severance tax is not applicable presently to coal produced at Westmoreland's Absaloka Mine on the ceded strip.

118. In September 1982, Westmoreland and the Crow Tribe entered into an agreement under which Westmoreland agreed to pay to the Tribe "a tax" equivalent in amount to Montana's taxes, and the Tribe agreed to give Westmoreland credit for any severance and gross proceeds taxes that Westmoreland is required to pay to the State of Montana or its political subdivisions.

119. The arrangement under which Westmoreland agreed to pay the Tribe this "tax" was proposed by the Tribe's counsel and appears to have been motivated

largely by the Tribe's desire to improve its position in this litigation.

120. The payments under this arrangement were denominated a tax to allow the producers to pass them forward to their utility customers under their coal contracts.

*Application of Coal Taxes to the Westmoreland Mine.*

121. Westmoreland Resources has been paying Montana's severance and gross proceeds taxes since 1975 pursuant to Mont.Code Ann. §§ 15-35-102 and 103. At year end 1982, Westmoreland had paid approximately \$53,800,000 in severance taxes and approximately \$8,100,000 in gross proceeds taxes.

122. Westmoreland has not paid any coal taxes to the Crow Tribe.

*Effect of Montana's Coal Taxes on the Tribe's Royalty Interest on Ceded Strip Coal*

123. There is no convincing evidence that the state's taxes affect the Crow Tribe's ability to obtain a reasonable royalty from Westmoreland.

124. The Tribe's first lease agreement with Westmoreland provided for a royalty of 17 1/4 cents per ton plus other benefits. Further negotiations in 1974 led to a lease amendment increasing the royalty payment to the Tribe to 35 cents per ton, or 6% f.o.b. mine price, whichever is greater. The 1974 agreement between the Tribe and Westmoreland also increases the royalty on future contracts to 40 cents or 8%, whichever is greater.

125. Under the 1974 agreement between the Tribe and Westmoreland, Westmoreland has agreed to renegotiate its royalty payments to the Tribe every ten years. The agreement provides that the renegotiated royalties will be set at or near the prevailing market rate.

126. The royalty payments which the Crow Tribe has negotiated from Westmoreland were recognized at the time as being among the highest anywhere, and the Tribe presented no evidence of any higher royalties being paid to any other Indian coal owner.

127. While the royalty percentage of the Tribe has increased since 1975, the percentage rate of the Montana severance tax has stayed the same, and there have in fact been adjustments to Montana's tax which reduce the effective rate of the tax, which, in turn, will reduce the disparity of total income received by the Tribe and the State of Montana.

128. The Tribe received approximately \$17,877,126 in royalties from Westmoreland through October 1983. In addition to royalties, the Tribe has received other benefits from Westmoreland. For example, the Crow Tribe has an employment preference provision in its agreement with Westmoreland which results in additional money and benefits to the Tribe.

*Effect of Montana's Coal Taxes on the Marketability of Ceded Strip Coal*

129. There is no convincing evidence in the record that the gross proceeds tax has prevented or impeded the marketing of the Tribe's ceded strip coal. There was also no testimony that any past or present negotiations to

market Crow coal have focused on the gross proceeds tax as a marketing factor.

130. There are numerous factors which affect the marketability of Montana coal, and more specifically, the Tribe's marketing of its ceded strip coal. Although the cumulative effect of coal taxes is one of these factors, the evidence at trial showed that the tax rate, at least at present, is overshadowed by other factors.

131. During a period from 1965 to 1983, the uncertainties created by the Crow Tribe's failure to adhere to agreements or establish clear policies, procedures, and directives, regarding development of their coal became significant factors in the development or lack of development of tribally-owned coal.

132. In the early to mid-1970's, with the adoption of clean air legislation, projections of increased electrical demand, and the Arab oil embargo, there was a boom in the demand for western coal. The coal market since the mid-1970's has softened, and there is now little or no demand for additional coal. Many coal companies in several states presently have excess production capacity and have found it increasingly difficult to market coal.

133. The characteristics of coal from a particular mine are important to a utility when a decision is being made to purchase coal. The ash, chemical characteristics, and physical properties, such as moisture, BTU value, and contamination, are important considerations for existing coal-burning plants. The plants' characteristics also affect a utility's decision to purchase. For new coal-burning plants, these factors, along with delivered cost,

possibility of future cost increases, environmental considerations, reliability of source, production capacity, reserves, and alternative sources influence the utilities' purchasing decisions.

134. Transportation costs are a major factor in the marketability of coal. It is generally acknowledged that the "delivered price" of coal is the critical economic factor in any purchaser's decision. A major component of the delivered price is the rail or transportation costs. Montana's coal taxes are a relatively small percentage of delivered price. Transportation costs and distances are the major factor in determining the logical marketing area for a mine's coal production. The railroads are in a position to significantly influence the marketing of a particular coal.

135. Montana's logical coal marketing area, which includes the upper midwest and the Pacific northwest, has experience [sic] less demand for coal since 1975 than Wyoming's logical market for coal, which is the south and southwest. Demand for coal in Montana's primary market in the midwest has been relatively soft because the demand for electricity and additional coal by utilities in the midwest has declined since the mid-1970's compared to the demand for electricity and additional coal in the south and southwest.

136. While the delivered price of coal is a critical economic factor in a purchaser's coal-sourcing decision, there are other non-economic factors which sometimes require a utility to purchase a higher-priced coal. For example, there are utilities in the midwest which have

purchased coal from Wyoming which will have significantly higher delivered price than purchase of Montana coal because these utilities require the better quality of Wyoming coal for environmental reasons.

137. There is no evidence that Westmoreland has lost or will lose any particular coal contract because of Montana's coal taxes. In spite of the relatively low BTU quality of Westmoreland's coal and the high moisture content generally present in Montana coal, a Westmoreland representative expressed guarded optimism that Westmoreland could effectively compete for contracts to supply coal to three plants scheduled to be on line in the next few years. Westmoreland has a significant transportation advantage with respect to these three plants.

138. The continued competitiveness of Montana coal is also demonstrated by the fact that there have been new mines opened in Montana since the severance tax was enacted in 1975, and there have been new applications filed with the Montana Department of State Lands by other coal companies expressing a desire to open new mines in Montana. Further, Montana companies have had new contract sales since the adoption of Montana's coal taxes in 1975.

139. Based on the 1982 agreement between the Crow Tribe and Westmoreland, if the Crow Tribe prevails in this lawsuit the Tribe would receive a payment equal to the amount Westmoreland is presently required to pay to the State of Montana. Based on this agreement, there would be no change in the effect, if any, of the taxes on the marketability of ceded strip coal. The Court does

recognize, however, that the Crow Tribe-Westmoreland agreement may be changed by further negotiation.

## CONCLUSIONS OF LAW

### I.

The Court has jurisdiction of this matter under 28 U.S.C. §§ 1331, 1345, and 1362. Venue is established under 28 U.S.C. § 1391(b).

### II.

It is inappropriate at this time to declare the rights of the parties respecting the validity of Montana's coal taxes assessed on coal produced within the external boundaries of the Crow Indian Reservation. Although the matter was considered on a motion to dismiss by both this Court and the United States Court of Appeals for the Ninth Circuit, the evidence adduced at trial indicates that there is no "substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Casualty Co. v. Pacific Coal & Oil*, 312 U.S. 270, 273, 61 S.Ct. 510, 512, 85 L.Ed. 826 (1941). The decision to issue declaratory relief rests in the sound discretion of the trial court. *See Provident Tradesmen's Bank & Trust v. Patterson*, 390 U.S. 102, 126, 88 S.Ct. 733, 746, 19 L.Ed.2d 936 (1968). The Court is reluctant to declare whether or not the state's coal tax statutes are valid on the reservation because: (a) no severance or gross proceeds tax has been assessed or collected on the Crow Indian Reservation; (b) there is no surface coal mine on the reservation which

produces coal arguably subject to the state's coal taxes; (c) although coal mining agreements have been reached between the Tribe and non-Indian lessees, the lessees have not entered into long-term coal contracts, and, because of a slumping coal market, the mines contemplated by the agreements may not come to fruition; (d) the record lacks detail with respect to surface coal mining on the reservation; and (e) the State should have an opportunity to reassess its position with regard to taxation of on-reservation coal after final resolution of the validity of the state's taxes on tribally-owned coal on the ceded strip.

### III.

Title to undisposed-of minerals underlying the ceded strip is held in trust by the United States for the Crow Indian Tribe.

(a) The second treaty of Fort Laramie, 1868, which set apart the 8 million acre Crow Reservation for undisturbed use and occupation of the Crow Tribe vested all beneficial property interests in the Tribe, including the rights to the underlying minerals. *United States v. Shoshone Tribe*, 304 U.S. 111, 117-118, 58 S.Ct. 794, 798, 82 L.Ed. 1213 (1938).

(b) Under the 1904 Cession Act, the Tribe gave up all right, title and interest to the ceded strip, but until the lands covered by the Act were actually disposed of, the Crow Tribe retained a beneficial interest in them. The United States acted as trustee for the Tribe with respect to disposal of lands and payment of sale proceeds. *Ash Sheep*

*Co. v. United States*, 252 U.S. 159, 40 S.Ct. 241, 64 L.Ed. 507 (1920); Act of April 27, 1904, 33 Stat. 352.

(c) When lands were disposed of under some of the homestead laws, e.g., Act of February 27, 1917, 39 Stat. 944, only the surface estates were granted. The mineral estates were reserved to the United States, and the Tribe retained the beneficial interest in the minerals that were reserved. See *Ash Sheep Co. v. United States*, *supra*.

(d) The 1958 Act restoring undisposed of lands to the Crow Tribe expressly states that "all lands now or hereafter classified as vacant and undisposed-of ceded lands . . . are hereby restored to tribal ownership." The vacant and undisposed of minerals underlying the ceded strip fall within this description and are embraced by this provision of the 1958 Act. Act of May 19, 1958, Pub.L. No. 85-420, 72 Stat. 121.

(e) In spite of the language designating approximate surface acreage to be restored on named reservations, the 1958 Act restored the minerals in the ceded strip to Crow tribal ownership. Act of May 19, 1958, 72 Stat. 121; Cf. Solicitor's Opinion M-34836, 59 I.D. 393 (1947); Solicitor's Opinion A-25219, 60 I.D. 174 (1948). The approximate acreage figure of 10,260.95 acres listed for the Crow Reservation creates an ambiguity on the face of the statute which can only be resolved by resort to legislative history. See *DeCoteau v. District Court*, 420 U.S. 425, 447, 95 S.Ct. 1082, 1094, 43 L.Ed.2d 300 (1975). The legislative history supports the conclusion that the 1958 Act restored the ceded strip minerals to the Crow Tribe. The two major related purposes of the 1958 Act, as revealed by its legislative history, were to accord equal

treatment to the tribes that did not accept the IRA and to restore to tribal ownership all of the surface lands and minerals interests that had been temporarily withdrawn following the enactment of the IRA. See *supra* Findings of Fact 21-22. If the ceded strip minerals in which the Crow Tribe retains a beneficial interest were not restored to full tribal ownership by the 1958 Act, the Crow Tribe would not receive the same treatment as the tribes whose lands and minerals were restored under § 3 of the IRA, 25 U.S.C. § 463. See 60 I.D. 174 (1948); 59 I.D. 393 (1947). Similarly, excluding the Tribe's ceded strip minerals from the coverage of the 1958 Act would conflict with that Act's express purpose of fully restoring to tribal ownership all of the surface lands and minerals that had temporarily withdrawn in 1934.

(f) Courts must interpret statutes in a manner that will promote, not defeat, the purposes that Congress sought to achieve. See *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 118, 103 S.Ct. 986, 994-95, 74 L.Ed.2d 845 (1983); *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 607-08, 99 S.Ct. 1905, 1910-11, 60 L.Ed.2d 508 (1979). Applying that principle of statutory construction to the 1958 Act inescapably leads to the conclusion that the "vacant and undisposed-of ceded lands" restored to the full beneficial ownership of the Crow Tribe include the previously undisposed-of mineral interests in the ceded strip in which the Tribe retained a beneficial interest.

(g) The undisposed-of ceded minerals underlying entered land were not added to and made a part of the Crow Reservation by the 1958 Act. The term "reservation

status" has little significance in describing a tribally-owned mineral estate which lies outside the surface boundaries of a tribe's reservation. The 1958 Act's legislative history provides no support for the anomalous proposition that Congress extended governmental powers and attributes of a tribe's inherent sovereignty to the subsurface estate in an area outside the boundaries of a diminished reservation where the surface is held predominantly by non-Indians.

## IV.

There exists no express authorization for the imposition of Montana's coal severance and gross proceeds taxes on the mining of coal held by the United States in trust for the Crow Tribe. The Supreme Court recently held that state authorization under the 1924 Indian Mineral Leasing Act, 25 U.S.C. § 398, to tax mineral production does not extend to leases issued pursuant to the 1938 Indian Mineral Leasing Act, 25 U.S.C. § 396a-396g. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 105 S.Ct. 2399, 85 L.Ed.2d 753 (1985).

## V.

The Court of Appeals recognized that mining of coal on the ceded strip created a "further complexity" in analyzing the validity of Montana's coal taxes. *Crow Tribe of Indians v. State of Montana*, 650 F.2d 1104 at 1114 (9th Cir.1981). Because this case was before the Circuit on a motion to dismiss, the factual record was insufficient to allow the court to analyze fully the distinctions between state taxation on the ceded strip and state taxation on the

reservation. This Court notes that the predominant focus of the Ninth Circuit's opinion is on the larger question of state taxation on the reservation. Insofar as this Court's conclusions depart from the Ninth Circuit's opinion, the Court believes them to be justified by the full factual record and by the jurisdictional vagaries applicable to the ceded strip which were elucidated at trial.

## VI.

Montana's coal taxes imposed on the production by a non-Indian mining company of coal held by the United States in trust for the Crow Indian Tribe outside the boundaries of the Crow Reservation are not preempted by federal law.

(a) An exercise of state jurisdiction is preempted when it directly conflicts with a federal enactment, *see, e.g., Kennerly v. District Court*, 400 U.S. 423, 91 S.Ct. 480, 27 L.Ed.2d 507 (1971), or when federal law or policy so pervasively governs the targeted activity that there remains no room for the additional burdens sought to be imposed by the state. *See, e.g., Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed.2d 165 (1965).

(b) Montana's coal taxes do not directly conflict with a congressional enactment because none exists which expressly bars the State of Montana from imposing its coal taxes on coal held by the United States in trust for the Crow Tribe. The Court finds this especially significant with respect to coal mined on the ceded strip. In *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973), the Supreme Court, noting that it does

not lightly imply tax exemptions, stated that tribal activities conducted outside the reservation present "different considerations" and that "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State." *Id.* at 148-49, 93 S.Ct. at 1270. The state urges that any fair reading of *Jones* leads to the conclusion that state coal taxes levied on the ceded strip are not preempted since Congress has not explicitly done so. While the Court agrees that the state's argument has force, it declines the opportunity to buttress its conclusion solely on *Jones*. Further analysis of federal policy underlying the 1938 Mineral Leasing Act, analysis which the Court of Appeals held to be applicable and which appropriately takes into account the tradition of Indian sovereignty, also leads to the conclusion that the Montana coal taxes are not preempted on the ceded strip.

(c) There exists no pervasive federal law or policy governing the leasing of tribally-owned coal that ousts a state tax on production of tribally-owned coal on the ceded strip.

(d) In determining whether a state law is preempted by pervasive federal law or policy, a court must undertake "a particularized inquiry into the nature of the state, federal, and tribal interests at stake. . . ." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145, 100 S.Ct. 2578, 2584, 65 L.Ed.2d 665 (1980). The standards of preemption applied in Indian law differ from those that have emerged in other areas of law. "The tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise

of state authority has been pre-empted by operation of federal law." *Id.* at 143, 100 S.Ct. at 2583.

(e) The fact that the tribally-owned ceded strip coal lies outside the boundary of the diminished reservation is an important consideration in the preemption analysis. "The Court has repeatedly emphasized that there is a significant geographical component to tribal sovereignty, a component which remains highly relevant to the preemption inquiry; though the reservation boundary is not absolute, it remains an important factor to weigh in determining whether state authority has exceeded the permissible limits." *White Mountain Apache Tribe v. Bracker*, 448 U.S. at 151, 100 S.Ct. at 2587.

(f) The Court of Appeals found that the 1938 Indian Mineral Leasing Act, 25 U.S.C. § 396a-396f, and the regulations promulgated under that Act, constituted the potential preemptive federal law in this case. The Ninth Circuit identified and directed this Court's preemption inquiry to three goals that Congress sought to achieve in enacting the 1938 Act:

First, the Act sought to achieve uniformity in the law governing mineral leases on Indian lands. . . . Second, the 1938 Act was designed to help achieve the broad policy of the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479 (1976), that tribal governments be revitalized. . . . Third, the 1938 Act was intended to encourage tribal economic development. . . .

*Crow Tribe of Indians v. State of Montana*, 650 F.2d at 1112-13; see *Montana v. Blackfeet Tribe of Indians*, 105 S.Ct. at 2404 n. 5. The Tribe's arguments and evidence attempt

to prove that the latter two goals are frustrated by the imposition of Montana's coal tax.

(g) State taxation of Crow coal on the ceded strip does not hinder the revitalization of Crow tribal government. The Court of Appeals determined that in the mineral leasing context, revitalization entailed increasing of tribal government's control over decisions to lease tribal lands and over conditions to be placed on leases. Evidence at trial did not show that the Montana taxes either deprived the Tribe of control in leasing its ceded strip coal or significantly affect the rate of development of coal mining on the ceded strip. Any deterrent in the marketing of tribally-owned ceded strip coal caused by the severance and gross proceeds taxes is overshadowed by the present marketing difficulties common to all Montana coal due to a decreased market for coal in markets traditionally served by Montana coal. Coal owned by the Crow Tribe has been further disadvantaged in the marketplace by the Tribe's inability to put a marketing program in place.

(h) Discouragement, if any, of tribal economic development caused by state taxation of tribally-owned coal on the ceded strip can be justified by the state's legitimate interests in raising revenue to offset the cost of services it provides on the ceded strip, to mitigate short and long-term impacts of mining, and to perpetuate the mineral wealth subject to its general civil jurisdiction. Contrary to the Tribe's assertion, the Ninth Circuit's opinion remanding this case does not require, at least with respect to ceded strip coal, that the state establish a mathematical equilibrium between the quantifiable costs of coal development and the revenue raised by its taxes

to avoid a finding that the state's taxes are preempted by federal law. Instead, the Ninth Circuit recognized that a state's legitimate interests also include such unquantifiable interests as the value of a trained workforce, an organized government and system of laws, as well as the unquantifiable burden of future socio-economic and environmental impacts resulting from coal mining. *Crow Tribe*, 650 F.2d at 1114. The ceded strip lies within the general civil jurisdiction of the State of Montana and outside the civil jurisdiction of the Crow Tribe. The state legislature has articulated legitimate and exceedingly strong regulatory interests and responsibilities and has imposed its coal taxes accordingly. Cf. *White Mountain Apache Tribe*, 448 U.S. at 150, 100 S.Ct. at 2587. *Ramah Navaho School Board v. Bureau of Revenue*, 458 U.S. 832, 845, 102 S.Ct. 3394, 3402, 73 L.Ed.2d 1174 (1982). The state's coal taxes do not impair the Crow Tribe's ability to obtain reasonable royalty rates when tribally-owned coal is leased.

(i) Montana's coal taxes are not in conflict with tribal taxation in the ceded area. The Tribe's tax ordinances have not been approved by the Secretary of the Interior for application to off-reservation mining because the Tribe lacks power under its own constitution to tax outside the reservation boundaries. The Court notes that in 1983 the Secretary withheld approval for the Hopi severance tax in part on the ground that due process does not permit a tribe to tax an activity with which it has no governmental nexus. See Exhibit D-417. A challenge that the Hopi Tribe was not empowered by its constitution to impose an off-reservation severance tax on its coal was raised but not addressed in the opinion.

## VII.

Montana's severance and gross proceeds taxes levied on the production of tribally-owned coal on the ceded strip do not infringe "on the right of reservation Indians to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220, 79 S.Ct. 269, 271, 3 L.Ed.2d 251 (1959).

(a) This "self-government test" is related to the pre-emption analysis insofar as federal law and policy encourage tribal self-sufficiency and economic development, but the right of tribal self-government serves as an independent barrier to the intrusive assertion of state regulatory authority over tribal reservations and members. *White Mountain Apache Tribe*, 448 U.S. at 142-43, 100 S.Ct. at 2583.

(b) In *Washington v. Confederated Tribes of Colville*, 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980), the Supreme Court described the important considerations when the self-government test is applied to resolve a conflict between a state and an Indian tribe.

The principle of tribal self-government, grounded in notions of inherent sovereignty and in congressional policies, seeks an accommodation between the interests of the Tribes and the Federal Government on one hand, and those of the State on the other. While the Tribes do have an interest in raising revenues for essential governmental programs, that interest is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services. The State also has a legitimate

governmental interest in raising revenues, and that interest is likewise strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services.

*Id.* at 156-57, 100 S.Ct. at 2083 (citation omitted, emphasis added).

(c) *Washington v. Confederated Tribes of Colville* illustrates that the reservation boundary is a significant factor in balancing the interests of the state against those of the federal government and tribe. The self-government analysis has little applicability to cases such as this where the state seeks to tax a non-Indian company for activities engaged in outside the reservation because, while tribes do retain "attributes of sovereignty over both their members and their territory," *United States v. Mazurie*, 419 U.S. 544, 557, 95 S.Ct. 710, 717, 42 L.Ed.2d 706 (1975), a tribe's governmental powers which arise from its retained sovereignty do not extend beyond the reservation boundaries. In 1904 the Crow Tribe relinquished its inherent authority to regulate or tax on the ceded strip and there has been no showing here that such power has been expressly returned to the Tribe by the United States. The relationship between Westmoreland Resources, Inc., and the Crow Tribe is purely contractual. Outside the reservation boundaries, on the ceded strip, this relationship carries with it no consent by Westmoreland to submit to the retained civil jurisdiction of the Crow Tribe. *Cf. Montana v. United States*, 450 U.S. 544, 565-66, 101 S.Ct. 1245, 1258-59, 67 L.Ed.2d 493 (1981). Thus, on the ceded strip, the Tribe's interest in raising revenues is weak because the Tribe lacks governmental power and other sovereign

interests which require accommodation with state interests under the self-government analysis.

(d) In any event, the self-government analysis leads to the conclusion that the state's taxes on the production of tribally-owned coal on the ceded strip are valid. A mere interest in raising revenues, even though the Tribe is in dire need of revenues to provide needed services on the reservation and to strengthen its economic base, does not in and of itself invalidate the state tax. There must be some contact between the Tribe's governmental power and the activities sought to be taxed. The Crow Tribe lacks such a connection with the off-reservation mining of its coal. The Tribe does not provide services on the ceded strip nor is it responsible for the impacts traceable to coal mining on the ceded strip. The evidence shows that the impacts of mining and the responsibilities for provision of services predominantly fall off the reservation and onto the state and local governments. With respect to ceded strip coal, the Tribe is not seeking increased revenues from a value which is generated on the reservation. The Tribe's interest in its off-reservation coal is an ownership interest which is not substantially different than the interest held by any other coal lessor. The evidence shows that this ownership interest, the royalty interest, has not been impaired by the imposition of the state's coal taxes.

#### VIII.

The Court concludes that the Tribe and its lessees cannot create a tax on coal produced on the ceded strip by agreement. The 1982 lease agreement between the Tribe and Westmoreland contains a clause under which

Westmoreland agreed to pay the Tribe a "tax" equal to the amount due under Montana's severance and gross proceeds tax laws with a credit for amounts actually paid to the state and local governments. Payment under this arrangement, which is collectible only because payor has consented, is simply not a tax. See *In re Lorber Industries*, 675 F.2d 1062, 1066 (9th Cir.1982).

#### IX.

Montana's taxes have not been shown to constitute an impermissible "multiple burden" on interstate commerce. In *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 102 S.Ct. 894, 71 L.Ed.2d 21 (1982), the Supreme Court noted that an impermissible burden on interstate commerce could arise if both the state and tribe taxed the same mining activity or if one or both taxed the activity at a greater rate than their contact with the activity would justify. *Id.* at 158 n. 26, 102 S.Ct. at 912 n. 26. The Crow Tribe is not authorized to tax the production of coal on the ceded strip. Thus, the ceded strip is within the state's and not the Tribe's taxing jurisdiction. Therefore, the Court need not reach this interstate commerce issue with respect to the ceded strip as there can be no multiple tax burden.

#### X.

The Tribe has also raised a claim that Montana's coal taxes on tribally-owned coal are invalid under the Indian Commerce Clause of the Constitution, Art. I, Sec. 8, Cl. 3. The Tribe claims that the taxes are invalid because they are not authorized by Congress or, at the least, they

constitute an undue burden on Indian commerce. As the Tribe recognizes, however, the Supreme Court has found it unnecessary to modify the preemption analysis "to hold that on-reservation activities involving a resident tribe are presumptively beyond the reach of state law even in the absence of comprehensive federal regulation. . . ." *Ramah Navaho School Board, Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 845, 102 S.Ct. 3394, 3402, 73 L.Ed.2d 1174 (1982). Therefore, the dormant Indian commerce clause cannot be used by the courts as an analytical avenue to the merits of cases such a [sic] that before this Court in addition to, or in lieu of, the preemption analysis absent a change in position by the Supreme Court.

## XI.

This Court's finding that there is presently no approved tribal tax on the ceded strip negates the Tribe's contention that Montana must provide a credit against its taxes in the amount of analogous tribal taxes. The Court, therefore, need not entertain the merits of that claim.

## XII.

Montana's coal taxes are not impermissible taxes on tribal trust property. The Tribe argues that because the taxes are in essence taxes on real property, the taxes must be viewed as being imposed ratably on both the producer's share and the royalty share. Consequently, the Tribe contends that the state cannot impose that portion of the tax attributable to the Tribe's royalty share. The Court concludes that Montana's taxes are not taxes on

tribal trust property. Both the Montana Supreme Court and the Court of Appeals have held that the legal incidence of the coal taxes falls on the producer. *See Commonwealth Edison v. Montana*, 189 Mont. 191, 615 P.2d 847, 850 (1980), *affirmed* 453 U.S. 609, 101 S.Ct. 2946, 69 L.Ed.2d 884 (1981); *Crow Tribe*, 650 F.2d at 1110. The Court of Appeals has noted, however, that it did not specifically address the question of where the tax incidence on the Tribe's royalty interest lies. *See Crow Tribe v. Montana*, 665 F.2d 1390 (9th Cir.1982). The severance tax statute clearly requires the "coal mine operator" to file the tax return and pay the severance tax. Mont.Code Ann. § 15-35-104 (1983). There is no requirement that the mine operator pass the tax back to the royalty owner. Similarly, the producer must pay the gross proceeds tax and there is no requirement that the tax be assessed against the royalty interest. *See* Mont.Code Ann. §§ 15-23-701 to 704 (1983). The producer, not the holder of the royalty interest, is subject to the imposition of liens upon the coal mine and the producer's personal property should the taxes not be paid. *See* Mont.Code Ann. § 15-23-704 (1983). The evidence at trial shows that coal mine operators pass Montana's coal taxes forward to the consumer. Thus, Montana's coal taxes are not levied on tribal property. The royalty interest is merely a component of the f.o.b. price on which the taxes directed at the producer are calculated.

## XIII.

For the foregoing reasons, the Court concludes that the Montana Coal Severance Tax and the Montana Gross Proceeds from Coal Tax are valid insofar as they are

applied to the production of coal held by the United States in trust for the Crow Tribe on the ceded strip.

An appropriate order shall issue in accordance with these Findings of Fact and Conclusions of Law.

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**CROW TRIBE OF INDIANS, Appellant,**

**v.**

**STATE OF MONTANA, and Ramon  
Dore, Director, Montana Department  
of Revenue, Appellees.**

**No. 79-4321.**

United States Court of Appeals,  
Ninth Circuit.

Jan. 5, 1982.

**ORDER**

Before TANG, FLETCHER and ALARCON, Circuit  
Judges.

The opinion 650 F.2d 1104 (9th Cir.) filed July 13, 1981  
is amended as follows:

The following footnotes are added:

4a footnotes the sentence on page 1111, left-hand  
column, ending on line 4 with the word "tax":

"4a. The tax incidence on the Tribe's royalty  
interest was not at issue and was not reached by  
the court."

15a footnotes the sentence on page 1114, right-hand  
column ending on line 21 with the citation to *Washington  
v. Confederated Tribes of Colville*, 447 U.S. 134, 163, 100 S.Ct.  
2069, 2085, 65 L.Ed.2d 10 (1980):

"15a. Appellees, in their petition for rehearing  
call to our attention *Commonwealth Edison Co. v.  
Montana*, 453 U.S. 609, 101 S.Ct. 2946, 69 L.Ed.2d  
884 (1981). In that case, in the context of a chal-  
lenge to the Montana coal severance tax as a

burden on interstate commerce, the Court upheld the tax against the challenge that it is not fairly related to the services provided by the state. The Court stated that wide latitude is afforded the states under the Due Process Clause in imposing taxes upon particular activities. It went on to note that no direct benefit need be shown to the class or individuals taxed, and that this latitude afforded the states is not changed merely because the taxed activity has some connection to interstate commerce. Completely different considerations are implicated in the case before us. Our task is to determine the limits of state power to tax Indian tribes, Indian-related activities and Indian trust property. Different congressional acts are at issue. Congressional policy with respect to Indian tribes is involved here, not the constitutionality of the tax. We do not find *Commonwealth Edison* to control this case as suggested by appellees."

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the proposal to amend the opinion, and of the suggestion for en banc rehearing, and no judge has objected to the amendment or requested a vote on the suggestion for rehearing en banc. Fed.R.App. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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**CROW TRIBE OF INDIANS,  
Plaintiff-Appellant,**

**v.**

**STATE OF MONTANA, and Ramon Dore,  
Director, Montana Department of Revenue,  
Defendants-Appellees.**

**No. 79-4321.**

United States Court of Appeals,  
Ninth Circuit.

Argued and Submitted Jan. 14, 1980.

Decided July 13, 1981.

The United States District Court for the District of Montana, James F. Battin, Chief Judge, 469 F.Supp. 154, dismissed suit by Indian tribe seeking declaratory and injunctive relief against enforcement of state law taxing coal mined and sold in state, and tribe appealed. The Court of Appeals, Fletcher, Circuit Judge, held that allegations of Indian tribe which sought injunctive and declaratory relief against imposition of state severance and gross proceed taxes on coal mined by non-Indians from reservation and from deposits held in trust for Indians stated a cause of action.

Reversed and remanded.

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Richard A. Baenen, Wilkinson, Cragun & Barker, Washington, D. C., argued, for plaintiff-appellant; Thomas J. Lynaugh, Lynaugh, Fitzgerald, Schoppert & Skaggs, Billings, Mont., Edward M. Fogarty, Wilkinson, Cragun & Barker, Washington, D. C., on brief.

Helena S. Maclay, Missoula, Mont., for defendants-appellees.

Appeal from the United States District Court For the District of Montana.

Before TANG, FLETCHER and ALARCON, Circuit Judges.

FLETCHER, Circuit Judge:

In 1975, Montana imposed severance and gross proceeds taxes on all coal mined and sold in Montana, including coal mined by non-Indians from the Crow Indian Reservation and from deposits held in trust for the Crow Tribe of Indians (Tribe). The Tribe sought injunctive and declaratory relief against the imposition of taxes on the production of non-Indian mineral lessees. The district court, 469 F.Supp. 154, dismissed the complaint under Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief could be granted, and the Tribe now appeals. Our jurisdiction is based on 28 U.S.C. § 1291.

We hold that even though the incidence of these taxes falls upon non-Indian lessees, the Tribe has alleged facts that, if proved, would establish that the taxes are preempted by the Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396g (1976), and that the taxes infringe upon the Tribe's right to govern itself. Accordingly, we reverse and remand.

# I.

Vast deposits of coal underlie both the Crow Reservation proper and an adjacent area known as the "ceded strip." The ceded strip consists of about 1,137,500 acres

that were originally part of the reservation. The Crow Tribe ceded its interest in the surface estate of the area to the United States in 1904 in order to open the area to non-Indian entry and settlement, pursuant to the Act of April 27, 1904, ch. 1624, 33 Stat. 352. Although surface interests were thereafter conveyed to non-Indians, *see Cady v. Morton*, 527 F.2d 786, 789 (9th Cir. 1975), rights to minerals underlying the ceded strip were in large part retained by the United States for the benefit of the Tribe. We held recently that the ceded area is not a part of the reservation. *Little Light v. Crist*, 649 F.2d 683, 685 (9th Cir. 1981). Regardless of the status of the ceded strip, however, the underlying minerals are held by the United States Government in trust for the Tribe.

Since 1967, the Secretary of the Interior has actively encouraged the Tribe to develop its coal resources through the granting of prospecting permits and mining leases. The leasing activity has taken place under the aegis of the Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396g (1976), and the regulations promulgated under the Act, 25 C.F.R. §§ 171.1-.30 (1980).

In 1972, Westmoreland Resources, a non-Indian company, entered into two mining leases with the Crow Tribe that embraced coal underlying about 31,000 acres of the ceded strip. The Tribe has also granted prospecting permits to and entered into leases with other non-Indian companies. To date, only Westmoreland Resources has actually mined coal under the leases.

In 1975, Montana enacted statutes that impose on coal mine operators a severance tax on each ton of coal produced in the state and a gross proceeds tax on the sale

of each ton of coal produced in the state. 4 Mont. Code Ann. §§ 15-35-101 through 15-35-111 and §§ 15-23-701 through 15-23-704 (1979) (formerly Mont.Rev. Code Ann. §§ 84-1312 through 84-1325 (1947)). Westmoreland Resources has been paying Montana's severance and gross proceeds taxes since 1975. Because Westmoreland Resources falls into the highest statutory classification, that of one who surface mines high-quality coal, it is required to pay a severance tax equal to 30 per cent of the value of the coal mined. Since 1975, Westmoreland has paid \$27 million in severance taxes and \$3 million in gross proceeds taxes. During the same period, Westmoreland has paid about \$8 million in royalties to the Tribe under the terms of its leases.

On January 31, 1976, the Tribe enacted its own coal tax code which provides for a severance tax of 25 per cent of the value of coal mined by the Tribe's lessees. At present, the tribal severance tax applies only to coal mined on the reservation, and not to coal mined on the ceded strip.<sup>1</sup>

## II

The Montana Coal Severance Tax, Mont. Code Ann. § 15-35-103, is "imposed on each ton of coal produced in the state." "Produced" means "severed from the earth." Mont. Code Ann. § 15-35-102. The tax is measured by the value of the "contract sales price" of the coal, which is defined as "the price of coal extracted and prepared for shipment f.o.b. mine, excluding that amount charged by

<sup>1</sup> See note 19 *infra*.

the seller to pay taxes paid on production." *Id.* The rate of tax varies from 3 to 30 per cent of the value of the coal, depending upon the quality of the coal and whether the mine is a surface or an underground mine. Mont. Code Ann. § 15-35-103. The tax is paid quarterly directly to the Montana Department of Revenue by each coal mine operator. Mont. Code Ann. § 15-35-104.

Montana has made elaborate provision for the disposition of funds gained through the coal severance tax. The major recipient is a special trust fund created by the Montana Constitution. Mont. Const. art. IX, § 5. The fund contains only monies collected pursuant to the severance tax. The principal of the fund may only be invaded on a three-fourths vote of the Montana legislature. The legislature may, however, appropriate the interest and income earned by the fund. Twenty-five per cent of the coal severance tax monies collected prior to December 31, 1979 were to go directly to the trust fund; 50 per cent of the collections after that date go into the fund.

The remaining severance tax monies are allocated to a variety of uses. The largest single use is a "local impact and education trust fund account," which is to receive between 26 and 37½ per cent of revenues. The remaining revenues go to state equalization aid to public schools, a coal area highway improvement fund, archeological preservation, various cultural projects, park acquisition and management, an alternative energy research fund, the general funds of the counties where the coal is mined, county land planning, and a sinking fund servicing renewable resource development bond accounts. Mont. Code Ann. § 15-35-108.

The Gross Proceeds from Coal Tax is imposed on "each person engaged in mining coal." Mont. Code Ann. § 15-23-701. Each person mining coal must file with the State Department of Revenue an annual report that must include, *inter alia*, a statement of the number of "tons of coal extracted, treated, and sold from the mine during the taxable period" and "the gross yield or value in dollars and cents derived from the contract sales price." *Id.* The Department of Revenue transmits to the county assessor of each county in which the coal mines are located the valuation of the gross proceeds of the mine. Mont. Code Ann. § 15-23-702. The county assessor then enters the value on an assessment roll, *id.*, and transmits a tax assessment to the county treasurer, who collects the taxes due from the coal operator. Mont. Code Ann. § 15-23-703.

### III

The litigants ask us to make difficult determinations concerning the limits of state power to tax Indians and Indian-related activities. Although the issue before the Supreme Court in *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973), was the narrow one of whether a state may tax reservation Indians for income earned on the reservation, the Court used the occasion to describe the analytical context in which such questions are to be viewed.

The Court in *McClanahan* stated that, in recent years, "the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption." 411 U.S. at 172, 93 S.Ct. at 1262. The Court noted, however, that it would

be a vast oversimplification to say that nothing is left of the doctrine of Indian sovereignty. *Id.* at 170, 93 S.Ct. at 1261. The doctrine remains relevant as a "backdrop against which the applicable treaties and federal statutes must be read." *Id.* at 172, 93 S.Ct. at 1262. The Court made the further observation that because the federal treaties and statutes in almost all cases do define the boundaries of federal and state jurisdiction, the extent of federal preemption and residual Indian sovereignty in the absence of federal legislation or treaty is essentially moot. *Id.* at 172 n.8, 93 S.Ct. at 1262 n.8. Finally, the Court in *McClanahan* stated that, if the state action is not preempted by federal legislation or treaty, the state need only satisfy the test laid down in *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1958), that state action must not infringe on the rights of reservation Indians to govern themselves. *Id.* at 171-72, 93 S.Ct. at 1261-1262.

Although the Court in *McClanahan* stated that tribal immunity from state taxation does not rest primarily on any inherent tribal sovereignty, we note that remnants of the sovereignty rationale are implicit in the holding of *McClanahan* in the form of certain presumptions. Direct state taxation of tribal property or the income of reservation Indians is presumed to be preempted, absent express congressional authorization. *Bryan v. Itasca County*, 426 U.S. 373, 376-77, 96 S.Ct. 2102, 2105-2106, 48 L.Ed.2d 710 (1976); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 475-81, 96 S.Ct. 1634, 1642-1645, 48 L.Ed.2d 96 (1976); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148, 93 S.Ct. 1267, 1270, 36 L.Ed.2d 114 (1973). In contrast, state taxation of non-Indian activities on the reservation can proceed without express congressional authorization,

even if the taxation affects Indians in some way. See *Washington v. Confederated Tribes of Colville*, 447 U.S. 134, 148, 100 S.Ct. 2069, 2078, 65 L.Ed.2d 10 (1980). It is enough that such taxation does not conflict with federal statutes or treaties or interfere to an impermissible extent with the ability of the tribe to govern itself.

In *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980), the Supreme Court discussed the principles of preemption to be applied in a case such as this. The Court noted that the test of whether a state law concerning Indians has been preempted is different from the test used to find federal preemption in other contexts. *Id.* at 140, 100 S.Ct. at 2582. The tradition of Indian independence from state control and the broad federal policies to the same end (the "backdrop" of Indian sovereignty described in *McClanahan*) color the way in which we view federal statutes and regulations affecting Indians. *Id.* The Court found that Congress intended broad preemptive effect to be accorded federal statutes and regulations when the state action in question threatens the "firm federal policy of promoting tribal self-sufficiency and economic development." *Id.* See generally D. Getches, D. Rosenfelt & C. Wilkinson, *Cases and Materials on Federal Indian Law* 295-99 (1979). No express congressional statement of preemptive intent is required; it is enough that the state law conflicts with the purpose or operation of a federal statute, regulation, or policy.<sup>2</sup> On the other hand, legitimate

<sup>2</sup> Of course, state law will be preempted where Congress expressly so provides, or where the federal regulation is of such

interests of the state must be considered, and the ultimate result where the conduct of non-Indians on the reservation is involved depends on "a particularized inquiry into the nature of the State, Federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *White Mountain Apache Tribe v. Bracker*, 448 U.S. at 149, 100 S.Ct. at 2586.

The accommodation of state and tribal interests is also central to the analysis of whether a state law infringes upon the right of reservation Indians to "make their own laws and be ruled by them." *Washington v. Confederated Tribes of Colville*, 447 U.S. 134, 156, 100 S.Ct. 2069, 2083, 65 L.Ed.2d 10 (1980) (quoting *Williams v. Lee*, 358 U.S. 217, 220, 79 S.Ct. 269, 270, 3 L.Ed.2d 251 (1959)). The self-government doctrine differs from the preemption analysis in that it specifically prohibits state action that impairs the ability of a tribe to exercise traditional governmental functions such as zoning, *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 663-64 (9th Cir. 1975), cert. denied, 429 U.S. 1038, 97 S.Ct. 731, 50 L.Ed.2d 748 (1977); vehicle registration, *Red Lake Band of Chippewa Indians v. Minnesota*, 311 Minn. 241, 248 N.W.2d 722 (1976), or the exercise of general civil jurisdiction over the members of the tribe, *Fisher v. District Court*, 424 U.S. 382, 96 S.Ct. 943, 47 L.Ed.2d 106 (1976); *Littell v. Nakai*, 344 F.2d 486 (9th Cir. 1965), cert. denied, 382 U.S. 986, 86 S.Ct. 531, 15 L.Ed.2d 474 (1966); *White v. Califano*, 581 F.2d 697 (8th Cir. 1978); *California v. Quechan Tribe*, 424 F.Supp. 969

breadth that it occupies the field, leaving no room for state involvement.

(S.D.Cal. 1977), *vacated on other grounds*, 595 F.2d 1153 (9th Cir. 1979) (tribe's sovereign immunity barred suit); *United States ex rel. Rollingson v. Blackfeet Tribal Court*, 244 F.Supp. 474 (D.Mont. 1965). See also *Arizona ex rel. Merrill v. Turtle*, 413 F.2d 683 (9th Cir. 1969), *cert. denied*, 396 U.S. 1003, 90 S.Ct. 551, 24 L.Ed.2d 494 (1970) (state has no authority to extradite Indians living on reservation). At base, however, the right of tribal self-government is a federal policy established by and subject to the will of Congress. Although self-government is related to federal preemption in the sense that both depend on congressional action and in the sense that preemption is considered in the context of the deeply ingrained traditional notions of self-government, the self-government doctrine is an independent barrier to state regulation. See *White Mountain Apache Tribe v. Bracker*, 448 U.S. at 140, 100 S.Ct. at 2582.

## IV

The Tribe initially argues that the incidence of Montana's taxes is on the Tribe. The tax is invalid, the Tribe contends, because Congress has not authorized the direct taxation of tribal mineral holdings, as required by the Supreme Court's rulings in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148, 93 S.Ct. 1267, 1270, 36 L.Ed.2d 114 (1973), and *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973).

This court must look to the operation of the taxing statutes to determine which party the Montana legislature intended to be liable for the tax. We find that the incidence of these taxes is on the non-Indian mineral lessee. Neither of the taxes is collected from the owner of

the mineral rights *in situ* (unless the owner also happens to be the producer),<sup>3</sup> and the tax is not required by law to be passed on to the owner or to any other party. See *American Oil Co. v. Neill*, 380 U.S. 451, 455-56, 85 S.Ct. 1130, 1133-1134, 14 L.Ed.2d 1 (1965); *First Agricultural Nat'l Bank v. State Tax Comm'n*, 392 U.S. 339, 346-47, 88 S.Ct. 2173, 2177-2178, 20 L.Ed.2d 1138 (1968); *Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 99, 62 S.Ct. 1, 3, 86 L.Ed. 65 (1941). Nor is the Tribe subject to any reporting requirements in connection with the tax. Furthermore, we note that the Montana Supreme Court has held that the severance tax is levied on the producer, and that the taxable event is the act of severance. *Commonwealth Edison Co. v. Montana*, 615 P.2d 847, 850, 857 (Mont.1980), *prob. juris. noted*, \_\_\_ U.S. \_\_\_, 101 S.Ct. 607, 66 L.Ed.2d 494 (1980). The Tribe is not obligated to pay the taxes, and it cannot be held liable for deficiencies.<sup>4</sup>

The extent to which the economic burden of the tax is passed on to the Tribe in the form of decreased royalties is not relevant to the limited inquiry we make here to determine the legal incidence of the tax. *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 481-82, 96 S.Ct. 1634, 1645-1646, 48 L.Ed.2d 96 (1976); *Fort Mojave Tribe v. County of San Bernardino*, 543 F.2d 1253, 1255 n.2, 1256 (9th Cir. 1976), *cert. denied*, 430 U.S. 983, 97 S.Ct.

<sup>3</sup> The Tribe has not alleged that it has mined any coal itself or that it has paid any taxes directly to the State of Montana.

<sup>4</sup> The coal mines themselves, however, are subject to the imposition of liens in the event the taxes are not paid. Mont. Code Ann. § 15-23-704. We are not called upon to express a view on the validity of this provision as applied to Indian coal *in situ*.

1678, 52 L.Ed.2d 377 (1977); *Agua Caliente Band of Mission Indians v. County of Riverside*, 442 F.2d 1184 (9th Cir. 1971), cert. denied, 405 U.S. 933, 92 S.Ct. 930, 30 L.Ed.2d 809 (1972); *Mescalero Tribe v. O'Cheskey*, 625 F.2d 967, 970 (10th Cir. 1980). See also *United States v. County of Fresno*, 429 U.S. 452, 97 S.Ct. 699, 50 L.Ed.2d 683 (1977); *Gurley v. Rhoden*, 421 U.S. 200, 204, 207, 95 S.Ct. 1605, 1608, 1610, 44 L.Ed.2d 110 (1975); *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361, 382 n.12, 84 S.Ct. 378, 390 n.12, 11 L.Ed.2d 389 (1964); *Connecticut General Life Ins. Co. v. Johnson*, 303 U.S. 77, 80, 58 S.Ct. 436, 438, 82 L.Ed. 673 (1938); *Lash's Prods. Co. v. United States*, 278 U.S. 175, 49 S.Ct. 100, 73 L.Ed. 251 (1929).

The Tribe argues that the ultimate intent of the Montana legislature was to tax the coal itself and thereby raise revenue, regulate the rate of production, and preserve the value of the natural resource. Our inquiry into the legislature's intent in this regard is limited to ascertaining the legal obligations imposed upon the concerned parties, however, and does not extend to divining the legislature's "true" economic object. *Gurley v. Rhoden*, 421 U.S. 200, 204-07, 95 S.Ct. 1605, 1608-1610, 44 L.Ed.2d 110 (1975). See also *United States v. Tax Comm'n of Mississippi*, 421 U.S. 599, 604-11, 95 S.Ct. 1872, 1876-1879, 44 L.Ed.2d 404 (1975); *American Oil Co. v. Neill*, 380 U.S. 451, 455-57, 85 S.Ct. 1130, 1133-1134, 14 L.Ed.2d 1 (1965); *Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 99, 62 S.Ct. 1, 3, 86 L.Ed. 65 (1941); *Alabama v. King & Boozer*, 314 U.S. 1, 62

S.Ct. 43, 86 L.Ed. 3 (1941). But see *United States v. City of Leavenworth*, 443 F.Supp. 274, 281-82 (D.Kan. 1977).<sup>5</sup>

## V

The Tribe argues that the Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396g (1976),<sup>6</sup> and the

<sup>5</sup> The Tribe also argues that Montana's taxes violate section 4 of the Enabling Act pursuant to which Montana was admitted to the Union. Section 4 provides:

Second. That the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States. . . .

Act of February 22, 1889, ch. 180, § 4, 25 Stat. 676. This disclaimer was adopted and ratified in Montana's original constitution, Mont. Const. Ord. I, 2 (1889), and in the state's new constitution, Mont. Const. art. I (1972).

Because we find that the incidence of these taxes falls on the non-Indian mineral lessee, we see no conflict between the taxes and the Enabling Act. *Truscott v. Hurlbut Land & Cattle Co.*, 73 F. 60 (9th Cir. 1896).

<sup>6</sup> The 1938 Act originally excluded the Crow Reservation from its coverage. 25 U.S.C. § 396f. Until 1959, mineral leasing on the Crow Reservation was governed by section 6 of the Crow Allotment Act of 1920, ch. 224, § 6, 41 Stat. 751, as amended by the Act of May 26, 1926, ch. 403, 44 Stat. 658. In 1959, Congress amended section 6 of the Crow Allotment Act of 1920 to provide that mineral leases on Crow lands were to be governed by

regulations promulgated thereunder, 25 C.F.R. §§ 171.1-.30 (1980),<sup>7</sup> sweep so broadly through the area of Indian mineral leasing that there is no room for state involvement.<sup>8</sup> See *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed.2d 165 (1965); *Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160, 100 S.Ct. 2592, 2599, 65 L.Ed.2d 684 (1980). We need not view preemption as so comprehensive in this case because we find that the Tribe's allegations, if not controverted, would establish that the challenged Montana taxes directly and substantially thwart the policies underlying the Mineral Leasing Act of 1938.

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provisions of the 1938 Act. Act of September 16, 1959, Pub. L. No. 86-283, 73 Stat. 565. See also Act of May 17, 1968, Pub. L. No. 90-308, 82 Stat. 123.

<sup>7</sup> See also 25 C.F.R. §§ 173.1-.29 (1980).

<sup>8</sup> The Tribe also argues that the taxes are preempted by the Tribe's enactment of its own coal severance tax on the mining of coal underlying the reservation and ceded strip. Absent a demonstration of congressional intent to delegate authority to the Tribe to preempt Montana's taxing statutes, the tribal ordinances carry no such preemptive effect.

The Tribe will have an opportunity to demonstrate on remand that Congress intended to delegate such regulatory and preemptive authority to the Tribe, and that there is a "direct conflict between state and tribal schemes." *Washington v. Confederated Tribes of Colville*, 447 U.S. 134, 156, 100 S.Ct. 2069, 2083, 65 L.Ed.2d 10. We note in this regard that 30 U.S.C. § 1300(a) (Supp.I 1977) indicates that Congress is contemplating a delegation to Indian tribes of some authority over surface mining on Indian lands. See note 17 *infra*.

The 1938 Act<sup>9</sup> was designed to achieve three goals. See H.R.Rep.No.1872, 75th Cong., 3d Sess. at 1-3 (1938); S.Rep.No.985, 75th Cong., 1st Sess. 2-3 (1937); United States Dep't of Interior, *Federal Indian Law* 695 n.45 (1958). First, the Act sought to achieve uniformity in the law governing mineral leases on Indian lands. Prior law had been a statutory hodgepodge that imposed different requirements for mineral leases on different Indian lands.<sup>10</sup> Second, the 1938 Act was designed to help

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<sup>9</sup> The 1938 Act provides that an Indian tribe may lease its lands for mining purposes with the approval of the Secretary of the Interior. 25 U.S.C. § 396a. Section 396b provides for the sale of oil and gas mining leases under regulations to be prescribed by the Secretary. The Secretary is authorized to reject all bids and readvertise leases when in the Secretary's judgment that course would be in the Indians' best interests. With the Indians' consent, a lease may be privately negotiated. Section 396b also safeguards the rights of tribes organized under the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479 (1976), to enter into mining leases in accordance with the provisions of that Act and with their tribal constitutions and corporate charters. Other sections specify the type of bond to be furnished by the lessees and authorize the Secretary to promulgate regulations. 25 U.S.C. §§ 396c, 396d.

The regulations promulgated by the Secretary under authority of the 1938 Act cover many aspects of mineral leasing between tribes and non-Indian lessees, including the procedures for acquiring mineral leases, minimum rates for rentals and royalties and the manner in which payments are to be made, penalties for failure to comply with the terms of leases, information to be supplied by lessees, acreage limitations, inspections of lessees' records by Indian lessors or by Department of Interior officials, and cancellation of leases. 25 C.F.R. §§ 171.1-.30 (1980); see also 25 C.F.R. §§ 173.1-.29 (1980).

<sup>10</sup> The 1938 Act achieved uniformity by including all tribally-owned (unallotted) lands, on or off the reservation,

achieve the broad policy of the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479 (1976), that tribal governments be revitalized. In the mineral leasing context, this meant giving tribal governments control over decisions to lease their lands and over lease conditions, subject to approval of the Secretary of Interior, where before the responsibility for such decisions was lodged in large part only with the Secretary.<sup>11</sup> Third, the 1938 Act was intended to encourage tribal economic development, an important objective of the Indian Reorganization Act of

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within its ambit, and by repealing "[a]ll Act [sic] or parts of Acts inconsistent herewith." Section 7 of the Act, 52 Stat. at 348 (not codified but set out at 25 U.S.C. § 396a note). The latter provision probably repealed the prior leasing statutes. See 84 Interior Dec. 905 (1977); cf. *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537 (10th Cir. 1980), cert. granted, \_\_\_ U.S. \_\_\_, 101 S.Ct. 71, 66 L.Ed.2d 21 (1981) (No.80-11) (reserving the question). Since 1938, the Interior Department has operated under the 1938 Act with regard to Indian mineral leases. See 84 Interior Dec. 905 (1977).

<sup>11</sup> Early Indian mineral leasing legislation placed varying amounts of control over leasing decisions with the Indian agent in charge of the reservation, 25 U.S.C. § 397 (1976), and with the Secretary of the Interior, 25 U.S.C. § 399 (1976). The latter statute contained no provision for Indian consent to the leases and permitted the Secretary to prescribe reasonable terms and conditions. Other statutes provided that Congress could appropriate lease revenues for various purposes. 25 U.S.C. §§ 400a, 398b.

Tribal control over resources was further diluted by holdings that the Secretary had no discretion in the granting of leases once land had been declared open for prospecting. In some cases, leases were granted over tribal objections. H.R.Rep.No.1872, 75th Cong., 3d Sess. at 2 (1938); S.Rep.No.985, 75th Cong., 1st Sess. at 2 (1937).

1934. Prior to the 1938 Act, the leasing of Indian lands for mining purposes was governed by mining laws applicable to public lands generally. Technical requirements and complicated procedures under these laws had prevented the leasing of much of the Indians' land, thus depriving them of considerable revenue. See H.R.Rep.No.1872, 75th Cong., 3d Sess. at 2 (1938); S.Rep.No.985, 75th Cong., 1st Sess. at 2 (1937); 79 Cong.Rec. 7815 (1938) (remarks of Sen. Thomas); *id.* at 8307-08 (remarks of Sen. Thomas). The 1938 Act provided that the land was to be leased by the Indians on terms restricted only by regulations to be adopted by the Secretary pursuant to the Act.

If the allegations of the complaint are sustained at trial, the Montana Coal Severance Tax will conflict with the purposes of the 1938 Act in several respects. Most prominently, the magnitude of the tax will prevent the Tribe from receiving a large portion of the economic benefits of its coal. The Montana legislature predicated its tax upon a finding that strip coal

is in sufficient demand that at least one-third of the price it commands at the mine may go to the economic rents of royalties and production taxes . . .

Mont.Code Ann. § 15-35-101(1)(e).<sup>12</sup> By setting the severance tax rate at 30 per cent of value, Montana made plain its intention to appropriate most of the economic rent. The substantial adverse effect on the Tribe's potential revenues is obvious when the state takes such a large

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<sup>12</sup> "Economic rent" is the amount of revenue that can be extracted from an activity, here in the form of royalties and taxes, without significantly discouraging production.

portion of this economic surplus.<sup>13</sup> The Tribe has alleged that, to date, Montana has realized \$27 million from its severance tax while the Tribe has received only \$8 million in royalties.<sup>14</sup>

Some economic impact on the Tribe can be justified if the state's interests in imposing the tax are legitimate.

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<sup>13</sup> Montana argues that the Crow Tribe has not itself paid a penny in severance taxes, that Westmoreland is the only party that has been so burdened, and that the Tribe has therefore received everything to which it was entitled under the terms of the Westmoreland lease. Thus, the state contends, the Tribe has suffered no economic hardship from the tax.

The argument is unconvincing for several reasons. First, the Tribe's complaint asks for a declaration that the tax will not apply to production under future leases that the Tribe wishes to enter into. The Tribe has alleged that the tax will reduce the royalties future lessees would be willing to pay. In this regard, we note that Shell Oil Company has asserted in its *amicus* brief that Montana's taxes severely reduce the compensation Shell can offer the Tribe in its ongoing coal lease negotiations. Furthermore, the Tribe alleges that the royalties under the Westmoreland lease are subject to renegotiation every ten years, and that the Tribe could negotiate for a greater portion of the coal's value if the severance tax were declared to be inapplicable.

As to the taxes already paid by Westmoreland, however, it is true that the Tribe has not paid any of the taxes and is apparently not entitled to any refund if the tax statutes are declared invalid.

<sup>14</sup> While none of the \$27 million came out of the Crow Tribe's pocket, *see* note 13 *supra*, the disparity between the revenues of the state and those of the Tribe arguably indicates the extent to which the state is attempting to secure a large share of the economic surplus.

Of course, revenue raising to support government is a proper purpose behind most taxes. Montana's severance tax, however, has an unusual and additional purpose going far beyond revenue raising to support government. The legislative subcommittee that gave birth to Montana's system of coal taxation described the severance tax device as follows:

Severance Taxes are levied upon a state's natural resources for several reasons. One, obviously, is the need for revenue. Another is that a state's natural resources, particularly its mineral resources, are nonrenewable. When the resources are mined, the state loses a valuable asset forever. The levying of a severance tax is one manner by which the state can share in the profits associated with the extraction of a mineral asset. . . .

Subcommittee on Fossil Fuel Taxation, Montana Legislative Council, *Fossil Fuel Taxation* 3 (Dec. 1974 Interim Study). This statement demonstrates a purpose to keep the value represented by the state's nonrenewable assets intact, for use by Montanans in the future. This purpose was implemented through the creation of the special trust fund under article IX, section 5 of the Montana Constitution. As discussed above, the fund is the major recipient of severance tax monies.<sup>15</sup> While the state may have an interest in perpetuating the value of mineral wealth subject to its general civil jurisdiction, it has no such legitimate interest in appropriating Indian mineral wealth.

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<sup>15</sup> See discussion at pp. 1108-1109 *supra*.

Furthermore, the severance tax is more than a revenue-raising device. It has regulatory purposes as well. The Subcommittee on Fossil Fuel Taxation, in describing the purposes behind severance taxes, stated

A severance tax . . . can help discourage resource waste; a basic assumption of severance taxation is that future generations will need mineral resources similar to those used today. By being production [sic], a severance tax can encourage producers to manage their operations efficiently.

Subcommittee on Fossil Fuel Taxation, Montana Legislative Council, *Fossil Fuel Taxation* 3-4 (Dec. 1974 Interim Study). This coal is not the state's to regulate, and assertion of such authority diminishes the Tribe's own power to regulate. Such state action conflicts with the 1938 Act's purpose of allowing tribes to control the development of their mineral resources.

Montana asserts other legitimate interests, however, that if substantiated at trial may ultimately affect the outcome of the litigation. It argues that western states are burdened with the phenomenon of the "energy boomtown." Large-scale mining operations in rural areas place great strains on state and local governments to provide roads, schools, utilities, fire and police protection, recreation and health facilities, and other more subtle benefits such as a trained work force and an organized government and system of laws. Coal may be mined on the reservation or ceded strip, but the coal miner will undoubtedly be using state services and burdening state government. In addition, mining on the reservation or ceded strip could cause significant environmental effects

elsewhere, such as ground and surface water pollution, air pollution, and solid waste disposal problems. The state may encounter substantial costs in dealing with these effects.

On balance, we suspect that these legitimate interests will not be shown to be enough to save the severance tax from fatal conflict with the purposes behind the 1938 Act. A tax carefully tailored to effectuate the state's legitimate interests might survive. *Washington v. Confederated Tribes of Colville*, 447 U.S. 134, 163, 100 S.Ct. 2069, 2085, 65 L.Ed.2d 10 (1980).

One further complexity deserves mention. Westmoreland is mining coal on the ceded strip. As discussed at p. 1107 *supra*, the ceded strip has been severed from the reservation proper.<sup>16</sup> That being the case, the balance of responsibilities between state and tribal governments may be altered to some degree. The Supreme Court has recognized that the policy of protecting Indian sovereignty involves a "significant geographical component . . . which remains highly relevant to the preemption inquiry; though the reservation boundary is not absolute, it remains an important factor to weigh in determining whether state authority has exceeded the permissible limits." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 148, 100 S.Ct. 2578, 2586.

<sup>16</sup> Regardless of the reservation status of the surface of the ceded area, we think it clear that the Mineral Leasing Act of 1938 is applicable to the leasing of the underlying coal. See discussion at p. 1107 *supra*.

Although the non-Indian land status of the surface of the ceded strip might make a difference if the state were attempting to raise revenue to implement its legitimate regulatory responsibilities on the surface, the state has not designed its tax to meet those needs. Instead, it appears to have attempted to appropriate a portion of the value of tribal resources that has no relationship to the services, if any, it provides.<sup>17</sup> Inquiry in this regard can be had on remand.

As for the Gross Proceeds from Coal Tax, the record is insufficient at this stage of the proceedings to reveal what state, tribal, and federal interests may be involved, or to indicate whether the tax's impact is sufficient to thwart the policies of the 1938 Act. We find that the Tribe has made allegations sufficient to raise the possibility that the tax may conflict with the 1938 Act.

## VI

The Tribe argues that Montana's taxes impermissibly infringe on the Tribe's ability to govern itself, and that the taxes therefore violate the principle articulated in *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251

<sup>17</sup> We note that Congress has directed the Secretary of Interior to submit proposed legislation allowing tribes to assume regulatory authority under the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201-1328 (Supp. I 1977), over surface mining on "Indian lands." 30 U.S.C. § 1300(a). "Indian lands" are defined as "all lands, including mineral interests, within the exterior boundaries of any Federal Indian reservation . . . and all lands including mineral interests held in trust for or supervised by an Indian tribe." 30 U.S.C. § 1291(9).

(1959), that, "absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Id.* at 220, 79 S.Ct. at 271. In *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973), the Supreme Court construed the *Williams v. Lee* test:

[C]ases applying the *Williams* test have dealt principally with situations involving non-Indians. . . . In these situations, both the tribe and the State could fairly claim an interest in asserting their respective jurisdictions. The *Williams* test was designed to resolve this conflict by providing that the State could protect its interest up to the point where tribal self-government would be affected.

411 U.S. at 179, 93 S.Ct. at 1266. We read *McClanahan* to require the reviewing court to balance the importance of the state interest in asserting the particular authority against the impact on the Tribe's ability to govern itself effectively. *Fort Mojave Tribe v. County of San Bernardino*, 543 F.2d 1253, 1257-58 (9th Cir. 1976).

The Tribe makes two arguments with respect to the self-government test. First, it argues that the state tax infringes on the Tribe's ability to levy its own severance tax.<sup>18</sup> Second, the Tribe contends that the state tax deprives it of the ability to negotiate with its lessees for

<sup>18</sup> It is now clear that, generally speaking, tribes retain the power to tax transactions that occur on trust lands and that significantly involve a tribe or its members. *Washington v. Confederated Tribes of Colville*, 447 U.S. 134, 152, 100 S.Ct. 2069, 2080, 65 L.Ed.2d 10 (1980).

higher royalties and thereby restricts its ability to generate revenues needed for tribal programs.

With respect to the tribal tax argument, we think that even if the state and tribal taxes were imposed on the same activity,<sup>19</sup> that fact alone would not preclude the state from imposing its tax. Each taxing body is free to impose its tax, since neither tax by its terms precludes the other. *Washington v. Confederated Tribes of Colville*, 447 U.S. 134, 159, 100 S.Ct. 2069, 2084, 65 L.Ed.2d 10 (1980). As a practical matter, however, it is true that Montana's tax may force the Tribe to choose between imposing its tax, thereby discouraging coal mining, or foregoing tax revenues.

In our view, the Tribe's impairment-of-tribal-tax argument raises the same concerns as the more generalized argument that the tax infringes on self-government

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<sup>19</sup> The Tribe's initial attempt to tax its lessees' coal production was partially frustrated by the Secretary of the Interior's refusal to sanction the Tribe's tax ordinances insofar as they applied to coal production on the ceded strip. The Secretary's refusal was based on the Tribe's constitution, which disclaimed authority over lands outside the reservation boundaries. The Tribe has since amended its constitution to allow it to tax mining activity on the ceded strip, and the tribal tax is once again being considered by the Secretary. The Secretary approved the tribal tax ordinance as it applied to the reservation proper.

Although it is true that, as far as Westmoreland's activities on the ceded strip are concerned, Montana's taxes and the tribal taxes do not presently conflict, the issue is nevertheless before us because the tribe has sought declaratory relief with regard to future mining operations on the reservation proper.

by preventing the Tribe from negotiating for higher royalties. Tribal economic enterprise is unique in that a tribe often engages in economic activity while simultaneously exercising more traditional governmental functions, such as taxation, with respect to the same activity. As a result, a tribe may obtain revenues either by manipulating the price of the goods it sells or by taxing its trading partners, where the tribe has taxing power. Which method a tribe chooses should be a matter of economic indifference to the parties, at least at the outset of the transaction.<sup>20</sup> The effect on tribal self-government is the same whether the state tax is seen as impairing the Tribe's ability to negotiate for higher royalties or as leaving no excess value for the Tribe to tax. Therefore, we give no special force to the Tribe's impairment-of-tribal-tax argument and view the central problem as that of the state's depriving the Tribe of potential revenues.

The Tribe has alleged that the imposition, assessment, and collection of Montana's taxes "severely impaired the ability of the sovereign Crow Tribe to serve its people through its various programs and governmental services, including but not limited to its vitally important land repurchase program, its tribal cultural and historical program, its tribal educational program

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<sup>20</sup> The form in which the Tribe gets paid for the resource could be very significant if its taxing power is not limited by contract. If the Tribe is not bound, it would be able to adjust its tax rate to changing economic conditions. In theory, this would allow it always to extract the maximum economic rent from the good or service without the necessity of renegotiating its royalty agreements.

and its reservation maintenance services." For the purpose of considering a motion for dismissal, we accept as true the allegation that the economic impact of Montana's taxes on tribal government is severe.

Tribal economic activity, while perhaps providing the wherewithal for tribal governments to sustain themselves, is at best indirectly linked to the effectiveness of tribal government. It is clear that a state tax is not invalid merely because it erodes a tribe's revenues, even when the tax substantially impairs the tribal government's ability to sustain itself and its programs. *Washington v. Confederated Tribes of Colville*, 447 U.S. 134, 152-156, 100 S.Ct. 2069, 2080-2083, 65 L.Ed.2d 10 (1980).

In *Washington v. Confederated Tribes of Colville*, 447 U.S. at 156, 100 S.Ct. at 2083, however, the Supreme Court impliedly recognized that a state's power to tax may be limited when such taxes adversely affect tribal revenues arising from certain goods and services. The Court, in the course of holding that the state could tax on-reservation sales of cigarettes by Indians to non-Indians, noted that "the value marketed by the smokeshops to persons coming from outside is not generated on the reservations by activities in which the Tribes have a significant interest," 447 U.S. at 152, 100 S.Ct. at 2083. The Court further stated:

The principle of tribal self-government, grounded in notions of inherent sovereignty and in congressional policies, seeks an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other. While the Tribes do have an interest in raising revenues for

essential governmental programs, that interest is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services. The State also has a legitimate governmental interest in raising revenues, and that interest is likewise strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services.

447 U.S. at 156-157, 100 S.Ct. at 2083 (citation omitted) (emphasis supplied).

In this case, the revenues sought to be taxed by Montana may ultimately be traced to the Tribe's mineral resources, a component of the reservation land itself. This is not a case where the tribe is simply marketing a tax exemption, as where tribes seek to sell tax-free cigarettes to non-Indians. Any substantial incursion into the revenues obtained from the sale of the Indians' land-based wealth cuts to the heart of the Tribe's ability to sustain itself.

As we have discussed, the Montana legislature has made clear its intention to appropriate a large portion of the surplus economic value of this coal. A major purpose of the tax is to establish a fund that would keep the value of the coal for future generations of Montanans. To the extent that this tax is not related to the actual governmental costs associated with the mining of the Indian coal, see *Washington v. Confederated Tribes of Colville*, 447 U.S. at 163, 100 S.Ct. at 2086, the state's interest in acquiring revenues is weak in comparison with the Tribe's right to the bounty from its own land.

We find that the Tribe's complaint adequately states a claim that the Montana taxes infringe on its right to govern itself. To support the claim at trial, the Tribe must show that the taxes substantially affect its ability to offer governmental services or its ability to regulate the development of tribal resources, and that the balance of state and tribal interests renders the state's assertion of taxing authority unreasonable.

Reversed and remanded for proceedings consistent with this opinion.

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**The CROW TRIBE OF INDIANS, Forest Horn, a member of the Crow Tribe and Chairman of the Crow Tribal Council, Ted Hogan, a member of the Crow Tribe and Secretary of the Crow Tribal Council, Jiggs Yellowtail, a member of the Crow Tribe, and Barney Old Coyote, a member of the Crow Tribe, Plaintiffs,**

**v.**

**The STATE OF MONTANA, Raymon Dore, Director, Montana Department of Revenue, Margaret Wheeler, Treasurer, Big Horn County, Montana, Betty Whaley, Assessor, Big Horn County, Montana, May Jenkins, Treasurer, Yellowstone County, Montana, Karen Van Haele, Treasurer, Treasure County, Montana, and Bernice Moerkerke, Assessor, Treasure County, Montana, Defendants.**

**No. 78-110-BLG.**

United States District Court,  
D. Montana,  
Billings Division.

April 3, 1979.

Individual Indians and an Indian tribe brought suit against the State of Montana and state and county officials questioning the legality of imposition of a state severance tax on coal produced by non-Indian coal mine lessees from Indian land and a certain ceded area. The District Court, Battin, Chief Judge, held, inter alia, that the severance tax was valid.

Motions to dismiss granted.

Richard A. Baenen, Edward M. Fogarty, Wilkinson, Cragun & Barker, Washington, D. C., Thomas J. Lynaugh, Lynaugh, Fitzgerald, Schoppert, Skaggs & Essman, Billings, Mont., for plaintiffs.

Helena S. Maclay and Keith C. Rennie, Jurisdiction Project, Missoula, Mont., for State of Montana.

Robert W. Corcoran, Chief Counsel, R. Bruce McGinnis, Deputy Chief Counsel, Montana State Dept. of Revenue, Helena, Mont., for Mont. Dept./Revenue.

James E. Seykora, Hardin, Mont., for Margaret Wheeler.

C. W. Jones, Deputy, Yellowstone County Atty., Billings, Mont., for Jenkins & Tooley.

J. B. Wheatcroft, Treasure County Atty., Hysham, Mont., for Van Haele and Moerkerke.

Harvey Bartle, III, Dechert, Price & Rhoads, Philadelphia, Pa., Bruce L. Ennis, R. H. Bellingham, Moulton, Bellingham, Longo & Mather, Billings, Mont., for defendants in intervention.

#### MEMORANDUM OPINION AND ORDER

BATTIN, Chief Judge.

##### I. Background

The plaintiffs in this case are the Crow Tribe of Indians and several individually named members of the Crow Tribe. The defendants are the State of Montana, Raymon Dore, Director of the Montana Department of Revenue, and the individually named county treasurers

and assessors for Big Horn, Yellowstone, and Treasure Counties, all in the District of Montana, and Westmoreland Resources, Inc., defendant in intervention.

For the purposes of this action, the Crow Reservation must be divided into two distinct legal entities. The Reservation proper consists of that territory granted to the Tribe by the Fort Laramie Treaty of 1851, 11 Stat. 749, II Kappler 594, as reduced by the Fort Laramie Treaty of 1868, 15 Stat. 649, II Kappler 1008, and by the Act of April 11, 1882, 22 Stat. 42, the Act of July 10, 1882, 22 Stat. 157, and by the Indian Appropriation Act of March 3, 1891, 26 Stat. 989. The "ceded area" or "ceded strip" is that area of land consisting of about 1,137,500 acres ceded by the Tribe to the United States in order to open the area to non-Indian entry and settlement, pursuant to the Act of April 27, 1904, 33 Stat. 352.

The surface estate to most of the ceded Crow land was disposed of by the Government pursuant to the provisions of the 1904 Act, but very little of the subsurface estate was ever sold by the Government. Virtually the entire Tribal mineral estate has been preserved and remains in the United States in trust and for the benefit of the Crow Tribe.

Underlying both the Reservation proper and the ceded strip are vast deposits of coal. Since 1967, the Secretary of the Interior and the Commissioner of Indian Affairs (now the Assistant Secretary of the Interior for Indian Affairs), have actively encouraged and approved prospecting permits and mining leases, all of which has brought large scale development of the coal resources underlying both the Reservation and the ceded area very

near reality. All mining and prospecting activities initiated to date have been entered into and approved pursuant to the statutory requirements of the Mineral Leasing Act of 1938 [Act of May 11, 1938], 52 Stat. 347 (codified at 25 U.S.C. §§ 396a through 396f), as well as the Department of the Interior regulations under the 1938 Act, 25 C.F.R. part 171 (1977).

To date, only one lessee, Westmoreland Resources, Inc. (hereinafter, "Westmoreland"), has undertaken active mining operations in the area in question. The successful bidder at a 1970 Bureau of Indian Affairs sale of Crow prospecting permits, Westmoreland entered into two mining leases with the Tribe in 1972. Those leases, embracing coal underlying some 30,876.25 acres of land in the ceded area, were amended in 1974 and approved later the same year.

In 1975, the State of Montana enacted a series of statutes, Revised Codes of Montana (1947) (hereinafter, "R.C.M., (1947)"), §§ 84-1312-84-1325 (now, M.C.A. §§ 15-35-101-15-35-109) by which was imposed upon coal mine operators a severance tax on each ton of coal produced in the State and a gross proceeds tax on the sale of each ton of coal produced in the State. Pursuant to the Montana statutes, Westmoreland has paid, since 1975, \$17,797,096.62 in severance taxes and \$1,707,320 in gross proceeds taxes to the State. In that same period of time, Westmoreland has paid, pursuant to its lease, \$5,514,955.06 in royalties, all of which has been paid to the Tribe.

On January 31, 1976, the Crow Tribe enacted its own coal tax code, imposing a severance tax of 25% of the

value of coal mined by lessees on the Reservation. The Crow coal tax code was approved as to taxation of coal underlying the Reservation proper, but, on March 3, 1978, was disapproved as to taxation of coal underlying the ceded area.

The Tribe has instituted this action, seeking a declaration that R.C.M., (1947) §§ 84-1312 through 84-1325 are violative of Article I, Section 8, Clause 3 of the Constitution of the United States, as the statutes invalidly impose severance and gross proceeds taxes on Crow coal. The Tribe has further sued for a declaration that the Montana statutes deprive the Tribe of rights secured to it by the Mineral Leasing Act of 1938 and the Treaty of Fort Laramie, and as such are void; for a declaration that the taxes in issue are violative of the due process provisions of the Fourteenth Amendment as well as the civil rights of the individually named plaintiffs and other members of the Tribe; and for a declaration that the State taxes impede Tribal self-government and are preempted by the Tribal ordinance imposing a severance tax on coal. Finally, the plaintiffs seek an injunction preventing the further imposition, assessment, or collection of coal severance or coal gross proceeds taxes by the defendant State of Montana.

The plaintiffs moved for, and were granted, leave to file a second amended complaint. The gravamen of the second amended complaint is that the State taxes, when imposed in conjunction with Tribal taxes, may raise the cost of producing coal under a Tribal lease to the point of economic unfeasibility, with the ultimate result that coal underlying Reservation and ceded lands may suffer from

non-development. In essence, the State taxation is alleged to have:

- (i) Illegally subjected the property of the sovereign Crow Tribe to an unauthorized state tax, in violation and/or derogation of Article I, Section 8, Clause 3 of the United States Constitution; the Mineral Leasing Act of 1938, as amended [citation omitted], and the Act of May 17, 1968 [citation omitted]; and the Fort Laramie Treaty of May 7, 1868 [citation omitted];
- (ii) Illegally reduced the ability of the sovereign Crow Tribe and its members to realize full benefit, use and development of their land, thereby depriving them of liberty and property without due process of law, in violation of the Fourteenth Amendment of the United States Constitution and of the Tribe's civil rights and the civil rights of its members;
- (iii) Illegally threatened the ability of the sovereign Crow Tribe to exercise its sovereignty through its lawful tribal tax;
- (iv) Illegally and severely infringed upon the right and ability of the sovereign Crow Tribe to govern itself and its people; and
- (v) Illegally and severely impaired the ability of the sovereign Crow Tribe to serve its people through its various tribal programs and governmental services, including but not limited to its vitally important land repurchase program, its tribal cultural and historical program, its tribal educational program and its reservation maintenance services.

The State of Montana has moved to dismiss the second amended complaint on three grounds:

(1) The State has moved to dismiss the claims of the Tribe on the grounds that the second amended complaint fails to state a claim upon which relief may be granted.

(2) The individually named defendants, Whaley, Tooley, and Moerkerke, have moved to dismiss on the grounds that as to them the second amended complaint fails to state a claim upon which relief may be granted.

(3) The State of Montana has moved to dismiss the claims of the individually named plaintiffs, Horn, Hogan, Yellowtail, and Old Coyote, on the grounds that the Court lacks subject matter jurisdiction over their claims.

As the plaintiffs have conceded that the position of the individually named defendants is well taken, and as the plaintiffs do not object to dismissal of the second amended complaint as to those defendants, there remain only two grounds to be addressed in considering defendants' motion to dismiss.

## II. *State of Montana's Motion to Dismiss For Failure to State a Claim.*

The plaintiffs have argued specifically, in opposition to the State's motion to dismiss, that the complaint in issue states a claim for the following reasons:

- A) The Montana coal severance tax and gross proceeds tax are without Congressional authorization;

- B) The Montana coal severance tax and gross proceeds tax impair the plaintiffs' right to self-government;
- C) The Montana coal severance tax and gross proceeds tax are preempted by federal law and by the Crow tribal coal tax.
- D) The Montana coal severance tax and gross proceeds tax are violative of the State's Enabling Act and Constitution.

Upon consideration of each of plaintiffs' arguments, it is evident that, on its motion to dismiss, the State of Montana must prevail.

A. *Congressional Authorization of the Montana Coal Severance and Gross Proceeds Taxes.*

In arguing that the taxes in issue are unconstitutional as applied to the coal underlying both the Reservation proper and the ceded strip, the plaintiffs have first advanced the argument that the State of Montana lacked the necessary Congressional authority to enact the taxing statutes. The bulwark of plaintiffs' argument in this regard is that Article I, Section 8, Clause 3 of the Constitution, which vests in Congress the exclusive authority "[t]o regulate Commerce . . . with the Indian Tribes", and the case law construing it, prohibit the State taxation here in issue. In analyzing plaintiffs' argument concerning the necessity of Congressional authorization, the major premise of the Tribe's argument is shown to be that, in the absence of express congressional authorization, the states are powerless to control or regulate Indian tribes or tribal trust lands. The plaintiffs rely heavily on *Mescalero Apache*

*Tribe v. Jones*, 411 U.S. 145, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973). In that case it was held that:

[I]n the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, and *McClanahan v. Arizona State Tax Comm'n* [411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129], [State Tax Commission of Arizona] *supra*, lays to rest any doubt in this respect by holding that such taxation is not permissible absent congressional consent. *Mescalero Apache Tribe v. Jones*, 411 U.S. at 148, 93 S.Ct. at 1270.

In urging *Jones* as authority for their position that congressional approval is required in order for the State taxes here in issue to be properly levied, the plaintiffs overlook two things. First, the holding of *Jones*, in which the State of New Mexico was found to have the power to impose a nondiscriminatory gross receipts tax on a ski resort operated by the tribe on off-reservation land, is substantially broader than plaintiffs have indicated. In that case, the Court stated further:

At the outset, we reject – as did the state court – the broad assertion that the Federal Government has exclusive jurisdiction over the Tribe for all purposes and that the State is therefore prohibited from enforcing its revenue laws against any tribal enterprise "[w]hether the enterprise is located on or off tribal land." *Jones*, 411 U.S. at 147, 93 S.Ct. at 1270.

The Court further stated that, in light of New Mexico's Enabling Act:

It is thus clear that in terms of general power New Mexico retained the right to tax, unless Congress forbade it, all Indian land and Indian activities located [on] or occurring "outside of an Indian reservation." 411 U.S. at 149-150, 93 S.Ct. at 1271.

The *Jones* case is not, as plaintiffs urge, a broad prohibition of State taxation, but rather, is limited to a prohibition of taxation by the states of land utilized by a tribe or tribal enterprise pursuant to Section 5 of the Indian Reorganization Act, 25 U.S.C. § 465. In *Jones*, it is further stated that:

Section 465 provides, in part, that "any lands or rights acquired" pursuant to any provision of the Act "shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation." [Footnote omitted.] On its face, the statute exempts land and rights in land, not income derived from its use. It is true that a statutory tax exemption for "lands" may, in light of its context and purposes, be construed to support an exemption for taxation on income derived from the land. [Citations omitted.] But, absent clear statutory guidance, courts ordinarily will not imply tax exemptions and will not exempt off-reservation income from tax simply because the land from which it is derived, or its other source, is itself exempt from tax. 411 U.S. at 155-156, 93 S.Ct. at 1274.

The second misconception nurtured by the plaintiffs throughout their argument is the assertion that the taxes here in issue are imposed upon the Tribe or upon tribal

trust land. The Montana statutes imposing the tax in issue are R.C.M. (1947) §§ 84-1314 and 84-1320-1322. Section 1314 provides:

A severance tax is imposed upon each ton of coal produced in the state, in accordance with the following schedule: . . . A person is not liable for any severance tax upon 20,000 tons of the coal he produces in a calendar year.

Under Section 1313, "produced" means "severed from the earth." Section 1320 provides:

Each person engaged in mining coal must, on or before March 31 each year, file with the department of revenue a statement of the gross yield from each coal mine owned or worked by such person in the proceeding [sic] calendar year and the value thereof. . . .

It is upon the basis of the report provided pursuant to § 1320 that the coal gross proceeds tax is levied.

It is evident from a reading of the taxing statutes that neither operates as a tax upon the Tribe, tribal trust lands, or the income of individual members of the Tribe. Rather, each tax is imposed upon the operators of coal mines – in this case, Westmoreland. The plaintiffs argue that, as the severance tax is imposed upon the coal, it is imposed upon a tribal trust estate. This argument must fail. Neither tax is imposed until such time as the coal has been severed from the leased realty, upon which occurrence the coal becomes the personalty of the mine operator.

The plaintiffs have not seriously contended that the State of Montana has no power to regulate Westmoreland's

operations, be they on reservation or off reservation in location. It is well settled that Montana may tax the property and receipts of Westmoreland and other non-Indian entities within the exterior boundaries of the State of Montana, whether on tribal trust land or not, *Thomas v. Gay*, 169 U.S. 264, 18 S.Ct. 340, 42 L.Ed. 740 (1898), *Oklahoma Tax Comm'n v. Texas Co.*, 336 U.S. 342, 69 S.Ct. 561, 93 L.Ed. 721 (1949), and congressional authorization is not required in order for the State to exercise its sovereignty.

The question of whether the Tribe, were it a mine operator, would be subject to State taxation upon coal produced on the reservation, or whether the Tribe would enjoy an immunity from State taxation is not properly before the Court at this time. However, even were the Tribe ultimately found to enjoy an immunity from State taxation of coal production, it is well settled that a non-Indian lessee of the Tribe would not share in that immunity. As the plaintiffs themselves have stated in their brief, the Mineral Leasing Act is silent on the question of taxing authority and tax immunity. Absent express statutory exemption from taxation, no such exemption may be inferred.

This Court has repeatedly said that tax exemptions are not granted by implication. . . . It has applied that rule to taxing acts affecting Indians as to all others. . . . If Congress intends to prevent the State of Oklahoma from levying a general non-discriminatory estate tax applying alike to all its citizens, it should say so in plain words. Such a conclusion cannot rest on dubious inferences. *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598, at 606-607, 63 S.Ct. 1284, at 1288, 87 L.Ed. 1612 (1943)

There are no allegations in the complaint that the taxes in issue violate a specific congressional prohibition of such taxation, or that they are discriminatory in effect. The only allegations plaintiffs offer are that the taxes are levied against "Crow coal", and that because the taxes are imposed against Indian or tribal realty, they must have the approval of Congress as a condition precedent to their validity. The plaintiffs' argument is clearly erroneous. The taxes in issue are levied against a non-Indian mine operator, as taxes upon personalty and income. The argument that such an obviously proper exercise of State sovereignty somehow requires prior congressional approval is without merit.

Conceptually, two relationships exist among the parties to this dispute. The Tribe, with the approval of the Secretary of the Interior and under the aegis of the Mineral Leasing Act of 1938, has entered into a mineral lease agreement with Westmoreland. That agreement has been reached in the proper procedural manner, with both parties following the administrative guidelines established by Congress and the Department of the Interior. No claim has been made by any party that the leases themselves were entered into without congressional authority or consent, and, by the admission of each party, such a claim could not properly be raised.

The second relationship in this dispute is that between Westmoreland and the State of Montana. By doing business within the State, Westmoreland has voluntarily subjected itself to the laws of the State, including those laws governing taxation. Although Montana may require congressional authorization to tax the Tribe or

individual Indians on their income, as a result of congressionally established immunity from such taxation, it cannot be said that a non-Indian lessee of the Tribe stands in the same relationship to the State as the Tribe itself. Clearly, the State of Montana need not secure the prior approval of Congress in order to tax a non-Indian enterprise doing business within the boundaries of the State. As was stated by the Supreme Court, in an opinion considering the relationship of a non-Indian lessee of Indian land to the State of Oklahoma:

We do not imply, by this decision, that Congress does not have power to immunize these lessees from the taxes we think the Constitution permits Oklahoma to impose in the absence of such action. [Footnote omitted.] The question whether immunity shall be extended in situations like these is essentially legislative in character. But Congress has not created an immunity here by affirmative action, [footnote omitted] and "The immunity formerly said to rest on constitutional implication cannot now be resurrected in the form of statutory implication." [Citations omitted.] "... if it appears that there is no ground for implying a constitutional immunity, there is equally a want of any ground for assuming any purpose on the part of Congress to create an immunity." *Oklahoma Tax Comm'n v. Texas Co.*, 336 U.S. 342, 365-366, 69 S.Ct. 561, 574, 93 L.Ed. 721 (1949).

No congressional enactment conferring state tax immunity upon lessees of Indian minerals has been cited by counsel, and we are aware of none. Further, that the Indian Reorganization Act has no bearing on Westmoreland's tax obligation to the State of Montana is made

plain by *Fort Mojave Tribe v. County of San Bernardino*, 543 F.2d 1253 (9th Cir. 1976). In that case the Ninth Circuit held that "[w]e . . . refuse to find that the [Indian Reorganization] Act created a tax exemption for non-Indian lessees of Indian land." 543 F.2d at 1256. Further,

When the state action is directed at non-Indians, with only indirect effects on Indians or Indian lands, it is necessary to reconcile the federal preemption rationale with the state's recognized authority to regulate its citizens. [Citation omitted.] Reconciliation requires that state legislation primarily directed at non-Indian lessees of Indian land be considered as not automatically preempted by the federal government in the absence of specific authorization. [Citations omitted.] To permit such non-Indians to enjoy the immunity designed for Indians requires, we believe, a stronger Congressional signal than a statute which neither precludes nor authorizes the taxation in question. 543 F.2d at 1257.

Absent a specific congressional mandate to the contrary, Montana has the power, in its sovereign capacity, to tax a non-Indian enterprise within its boundaries, even if the situs of the enterprise is within the exterior boundaries of an Indian reservation. This power is freely exercisable by the State without consent or authorization of Congress. Clearly, no affirmative congressional authority exists for the Montana taxing statutes here in issue, for none is needed.

B. *Interference With Tribal Self-Government.*

It is the plaintiffs' contention with respect to the issue of whether the State taxes impede or impair tribal self-government that both because the economic effects of the tax fall upon the Tribe and because the Tribe is economically restrained from either receiving greater royalties or imposing its own tax upon coal production, the taxes in issue run afoul of the protection of tribal self-government affirmed in *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959), and the cases following it. The test established by *Williams* for whether a state law impairs tribal self-government, and is hence subject to attack, has been stated as:

Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be [governed] by them. *Williams*, 358 U.S. at 220, 79 S.Ct. at 271.

And further:

[I]f a tribe has proved and/or a state concedes that the state [statute] causes an actual interference with the performance of the [tribe's] governmental obligations, the courts must, consistent with *Williams*, strike the [statute] down. *Confederated Tribes of Colville Reservation v. Washington*, 446 F.Supp. 1339, 1363-1364 (E.D.Wash.1978).

The Tribe rests its allegations of interference with self-government upon the relative economic benefits realized by the State and the Tribe as a result of Westmoreland's mining operations. The Tribe contends that because the

State derives more revenue through its taxation of Westmoreland's operations than does the Tribe through its royalty agreement with Westmoreland, tribal self-government is greatly impaired. However, the fact remains that the lease agreements between the Tribe and Westmoreland were freely and voluntarily entered into by both parties and approved administratively. The royalty to be paid by Westmoreland upon the coal produced pursuant to the lease must be assumed to have been a point of negotiation. As with any arm's length transaction, the Tribe was free either to accept or reject the terms offered by Westmoreland. In other words, the revenue received by the Tribe as a result of Westmoreland's operations is not, as plaintiffs argue, a result of State taxation; rather, it is a product of the Tribe's own bargaining at the time the leases were entered into by both parties.

The plaintiffs have further argued that the State taxes interfere with the Tribe's ability to control the scope and timing of development of its coal resources, and that such an interference is contrary to the protection accorded Indian tribes by *Williams v. Lee* and *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038, 97 S.Ct. 731, 50 L.Ed.2d 748 (1976). The plaintiffs cite *Santa Rosa* for the proposition that

. . . tribal use and development of tribal trust property presently is one of the main vehicles for the economic self-development necessary to equal Indian participation in American life. Extension of local jurisdiction to the reservation would burden that development by increasing its cost. . . . But more critically, subjecting the reservation to local jurisdiction would dilute if not altogether eliminate Indian political control

of the timing and scope of the development of reservation resources. . . . *Santa Rosa*, 532 F.2d at 664.

It must be borne in mind, however, in considering the impact of authority such as *Santa Rosa* upon resolution of the instant case that there is a distinct factual dissimilarity between the two cases. In *Santa Rosa*, an Indian tribe and two of its members brought an action for declaratory and injunctive relief to restrain enforcement of certain county ordinances. The district court granted the requested relief, and the county appealed. The Court of Appeals held that the county was without jurisdiction to enforce its zoning ordinances or building code on Indian reservation trust land, and that the courts must determine on a case-by-case basis when concrete disputes arise whether a county has jurisdiction to enforce any particular ordinance against Indian reservation or trust land. In so holding, the Court of Appeals stated:

At the outset, we emphasize that this suit involves an attempt to regulate Indian use of Indian trust lands. We are clear, regardless of the modification worked in the exclusive Federal jurisdiction and tribal sovereignty doctrines of *Worcester v. Georgia*, 31 U.S. (6 Pet. 515) 350, 8 L.Ed. 483 (1832), by subsequent Court decisions such as *Organized Village of Kake v. Egan*, 369 U.S. 60, 82 S.Ct. 562, 7 L.Ed.2d 573 (1962) and *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959), that in any event any concurrent jurisdiction the states might inherently have possessed to regulate Indian use of reservation lands has long ago been preempted by extensive Federal policy and legislation. *Santa Rosa*, 532 F.2d at 658.

The essential question addressed by the Court in *Santa Rosa* was one involving construction of Public Law 280, 28 U.S.C. § 1360, which vests in certain enumerated states civil jurisdiction over certain enumerated tribes. The Court of Appeals held, in essence, that Public Law 280 subjected Indian country only to the civil laws of the state and not to local (county) regulation. In so holding the Court stated that:

From that perspective, we conclude that Congress did not contemplate immediate transfer to local governments of civil regulatory control over reservations. Prior to passage of P.L. 280, Congress had encouraged, under § 476 of the Indian Reorganization Act, the formation and exercise of tribal self-government on reservation trust lands. A construction of P.L. 280 conferring jurisdiction to local county and municipal governments would significantly undermine, if not destroy, such tribal self-government. By transferring regulation of all matters of local concern to local governments, the tribal government would be left little or no scope to operate. We think it more plausible that Congress had in mind a distribution of jurisdiction which would make the tribal government over the reservation more or less the equivalent of a county or local government in other areas within the state, empowered, subject to the paramount provisions of state law, to regulate matters of local concern within the area of its jurisdiction. *Santa Rosa*, 532 F.2d at 662-663.

It must be borne in mind in considering the holding of *Santa Rosa* that the local governmental controls being attacked in the case were zoning controls imposed by the defendant, Kings County. It must also be borne in mind

that the reservation had, by virtue of Public Law 280, already been totally subjected to the jurisdiction of the State of California. The distinction between *Santa Rosa* and the instant case is obvious; the contrast of local governmental zoning control over Indian housing on Indian trust land to state taxation of a non-Indian enterprise on land that has been ceded by the Crow Tribe to the United States reveals that on the facts alone, *Santa Rosa* is inapplicable in this case. As a matter of law, the remote economic effect to the Tribe of Montana's taxation of Westmoreland's production and income arising out of operation under tribal coal leases – economic effect which is so remote as to have thus far evaded definition – is insufficient to constitute an interference with Crow tribal self-government.

### C. Preemption.

Intertwined with their argument that the taxes in issue impermissibly interfere with tribal self-government is plaintiffs' claim that the State taxes have been preempted by the Crow tribal coal tax. In so arguing they allege that the Montana taxes conflict with the taxes imposed by the Tribe, serving to reduce the amount of revenue the Tribe is able to receive as a result of Westmoreland's production. The Montana taxes, the plaintiffs argue, run afoul of the holding in *Warren Trading Post v. Arizona Tax Commission*, 380 U.S. 685, 691, 85 S.Ct. 1242, 1246, 14 L.Ed.2d 165 (1965), wherein it was stated that a

... state tax on gross income would put financial burdens on [the non-Indian trader] or the Indians with whom it deals in addition to those Congress or the tribes have prescribed, and

could thereby disturb and disarrange the statutory plan Congress set up in order to protect Indians. . . .

However, the question of preemption raised by the plaintiffs in this case is quite different from the question addressed by the Court in *Warren Trading Post*. In that case the appellant, an operator of a retail trading post on the Navajo Indian Reservation, under a license granted by the Commissioner of Indian Affairs pursuant to 25 U.S.C. § 261, challenged the right of Arizona to levy a tax on his income from trading with reservation Indians on the Reservation. The Supreme Court, in invalidating Arizona's tax, held that since Congress had broadly occupied the field of trading with Indians on reservations by all-inclusive regulations and statutes, the states may not permissibly impose additional burdens on the traders or the Indians. In speaking about the federal regulatory framework by which Indian traders are governed, the Court said:

[T]hese apparently all-inclusive regulations and the statutes authorizing them would seem in themselves sufficient to show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders. *Warren Trading Post*, 380 U.S. at 690, 85 S.Ct. at 1245.

In the instant case, however, there is no body of federal law either governing the method by which coal underlying reservation lands is to be taxed or immunizing non-Indian lessees from the application of state law. A Ninth Circuit case, *Fort Mojave Tribe v. County of San Bernardino*, 543 F.2d 1253 (9th Cir. 1976), is instructive

upon the application of the doctrine of preemption to taxation of non-Indian lessees of Indian trust land. In that case, appeal was taken from the judgment of the United States District Court for the Central District of California, upholding a possessory interest tax imposed by the defendant County on non-Indian lessees of land held in trust for the Fort Mojave Indian Tribe. The Court of Appeals held that imposition of possessory interest taxes on non-Indian lessees did not violate the Indian Reorganization Act, and was not invalid as being an infringement upon the Tribe's right to govern itself. Further, it was held that imposition of possessory interest taxes by both the Fort Mojave Indian Tribe and San Bernardino County on non-Indian lessees of Indian land did not result in improper double taxation. The essence of the *Fort Mojave* decision was that the concept of Indian sovereignty is no longer the proper major focus of analysis in taxing situations. Rather, the inquiry is one involving analysis of the applicable federal statutes to determine whether state action has been preempted. If not, the state statute need only satisfy the test laid down in *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1958), which is that it not infringe on the rights of reservation Indians to make their own laws and be governed by them. Federal statutes clearly have not preempted the area of a state's taxation of coal produced within its exterior boundaries, even if that coal lies under Indian Reservation lands. The Mineral Leasing Act, as well as the other federal statutes governing lease by the Crow Tribe of the coal estate in question, is silent as to taxation. The Tribe is not, of course, prevented from enacting taxing measures of their own, which, to a certain degree, has already been done.

Should the Tribe do so, however, the mere enactment of a tribal taxing statute would not preempt the state statute taxing the same subject matter. As was stated by the Court in *Fort Mojave*, in considering the problem of taxation of the same subject matter by both the County and the Tribe:

The assertion that "double taxation," resulting from the imposition of a tax both by the county and the tribe, impairs the ability of the tribe to levy its tax is not persuasive. There is no improper double taxation here at all, for the taxes are being imposed by two different and distinct taxing authorities. The tribe faces the same problem as other taxing agencies confront when they seek to impose a tax in an area already taxed by another entity having taxing power. We hold that the uncertain economic burden here imposed on the tribe's ability to levy a tax does not interfere with their right of self-government. *Fort Mojave*, 543 F.2d at 1258.

Most persuasive on the issue of preemption, however, is a close analysis of the present effect of the Crow Tribe's coal tax. As the plaintiffs have indicated in their memoranda to the Court, the Tribe has adopted and approved a coal severance tax upon coal produced from beneath the Reservation trust lands. No gross proceeds tax has been enacted by the Tribe. At present, the only mining being done is that of coal underlying the ceded strip. By the plaintiffs' own admission the tribal taxing statutes do not affect mining in the ceded area. The simple fact is that the Crow Tribe, although possessing a certain measure of taxing power, has as yet taxed no one, and no one has as yet been taxed by both the tribe and

the State upon production of or proceeds from coal. It is therefore apparent that plaintiffs' claim that the Montana taxing statutes here in issue have been preempted by federal statutes as well as the Crow Tribal coal tax is without merit.

*D. Enabling Act and Constitutional Claims.*

Section 4 of the Enabling Act pursuant to which Montana was admitted to the Union provides:

That the people inhabiting said proposed states do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States. . . . Enabling Act of February 22, 1899, 25 Stat. 676.

The Constitution adopted and ratified by the people of Montana in 1889 pursuant to the Enabling Act recognized and accepted the limitation upon the State's power to tax. Ordinance No. I to the 1889 Constitution of the State of Montana provided:

Second. That the people inhabiting the said proposed state of Montana, do agree and declare that they forever disclaim all right and title to . . . all lands lying within said limits owned or held by any Indian or Indian tribes, and that

until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States. . . . Montana Constitution, Ord. I, 2 (1889).

The same disclaimer is expressly reaffirmed by and incorporated in Article I of the Montana Constitution of 1972.

Upon the basis of the disclaimer of jurisdiction appearing in both the Enabling Act and the Constitution, the plaintiffs contend that the State is without authority to enact, let alone assess the taxes contemplated by R.C.M., (1947) §§ 84-1312 through 84-1325. Plaintiffs' argument in this connection suffers the same failing, however, as did their argument that the taxes in issue lack congressional authority. Plaintiffs, in arguing that the Montana coal severance tax and Montana coal gross proceeds tax are violative of both the Constitution and Enabling Act of the State, are arguing from the position that the taxes are levied against either the Tribe or tribal trust land. That contention has previously been expressly rejected. Plainly, the taxes in issue are imposed upon the production and income of non-Indian coal mine operators. The taxes levied are levied upon personalty. In distinguishing between taxation of Indians or Indian realty and personalty found upon the reservation in the possession of a third party, the Ninth Circuit stated, in *Truscott v. Hurlbut Land and Cattle Co.*, 73 F. 60 (9th Cir. 1896):

The people inhabiting the proposed state [of Montana] were required by congress to agree, and did agree, as one of the conditions to its admission into the Union, to disclaim any right

or title to all lands lying within the limits of the proposed state owned or held by any Indian or Indian tribes, and that, until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and under the absolute jurisdiction and control of congress. The people inhabiting the proposed state were required to make, and did make, as one of the conditions of its admission into the Union, a similar disclaimer in respect to all right and title to the unappropriated public lands lying within its boundaries. Those, too, remained in the absolute jurisdiction and control of congress for all purposes relating to their control or disposition. The state could not tax or incumber such unappropriated public lands, or otherwise interfere with the jurisdiction and control over them reserved by the United States, *but no one, we apprehend, would contend that personal property taken upon them by a third party, whether rightfully or wrongfully, would not be liable to be taxed in the state and county in which it should be found.* *Truscott*, 73 F. at 64 (emphasis added).

The *Truscott* Court went on further to say that:

In reserving lands for the exclusive and undisturbed use of these Indians and for others who, with their consent and with that of the United States, should occupy them, it was not the intention of congress to establish an asylum into which persons other than the Indians, whether natural or artificial, can take their property, and hold it exempt from its just portion of the taxation necessary for the support of the government which gives it protection. *Truscott*, 73 F. at 65.

As the taxes in issue are assessed solely against Westmoreland, a non-Indian entity, and are in fact assessed solely against Westmoreland's personalty - severed coal and gross proceeds from coal - it is inconceivable that any infringement upon Indian rights has been worked, or that any abridgement of either the Enabling Act or the Montana Constitution has occurred. Montana has in no way exceeded its sovereign powers in either legislating or assessing the coal severance and gross proceeds from coal taxes. To strike down the taxes in issue would be to extend to Westmoreland an immunity from State law which is antithetical to both the letter and the trend of the law concerning State jurisdiction over Indian reservations. To work such a drastic alteration requires exercise of legislative, and not judicial, discretion. The result sought by plaintiffs is one that Congress, and not the Courts, must give them.

From the foregoing, it is evident that plaintiffs can prove no set of facts in support of any of their four enumerated claims which would entitle them to the requested relief. *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). As plaintiffs' claims are without basis either in fact or in law, they are insufficient to survive the State of Montana's motion to dismiss. The motion to dismiss the second amended complaint for failure to state a claim is meritorious, and must be granted.

### III. *Motion to Dismiss the Claims of the Individually Named Plaintiffs for Want of Subject Matter Jurisdiction*

By this motion the State seeks to dismiss the claims of the individually named plaintiffs, Horn, Hogan, Yellowtail,

and Old Coyote, for want of jurisdiction. The individually named plaintiffs have brought their claims pursuant to 28 U.S.C. §§ 1331 and 1343.

Section 1331 recites that:

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

The Second Amended Complaint recites, in paragraph 1, that the amount in controversy exceeds, exclusive of interest and costs, \$10,000. No allegation appears in the complaint that the amount in controversy as to each plaintiff exceeds the jurisdictional amount of \$10,000. It is well settled that in an action in which jurisdiction is invoked pursuant to 28 U.S.C. § 1331, each plaintiff must not only allege but also be able to meet the jurisdictional amount requirement. *Zahn v. International Paper Co.*, 414 U.S. 291, 94 S.Ct. 505, 38 L.Ed.2d 511 (1973). It is essential that each of the individual plaintiffs properly plead the amount in controversy prior to this Court's recognizing its jurisdiction. The value of the matter in controversy must be measured not by the importance of the principle involved, but by the monetary value of the right sought to be gained. *Yoder v. Assiniboine & Sioux Tribes*, 339 F.2d 360 (9th Cir. 1964). Here, the matter sought to be gained is immunity for lessees of the Tribe from the coal severance and coal gross proceeds taxes. The principal allegation as to value supporting the plaintiffs' claim is that the Tribe, and not the individual plaintiffs, would be in a better bargaining position for the negotiation of coal leases if

Montana were enjoined from imposing its taxes upon Crow tribal lessees. The monetary benefits sought here to be gained accrue solely to the Tribe; as such, any right or matter in controversy accruing to the individual plaintiffs is necessarily based upon a theory that each has a right to share in any benefits accruing to the Tribe. It is evident, however, that individual members of the Tribe cannot claim, as a matter of right, any specific portion of tribal benefits for themselves.

In the absence of legislation to the contrary, the individual Indian has no right as against the tribe to any specific part of the tribal property. It is often said that the individual has only a "prospective right" to future income from tribal property in which he has no present interest. . . . Until the property loses its tribal character and becomes individualized, his right can be no more than this. . . . In the case of tribal funds, he has, ordinarily, no vested right in them until they have been paid over to him or have been set over to his credit. . . . *Felix Cohen, Handbook of Federal Indian Law*, 183-184 (1942).

It is evident that the individually named plaintiffs have no economic interest or matter in controversy sufficiently detached from the general economic injury alleged by the Tribe such that they are entitled to invoke this Court's federal question jurisdiction under § 1331. Further, as no specific allegations of amount in controversy appear as to each plaintiff, this Court is without subject matter jurisdiction over the claims of Horn, Hogan, Yellowtail, and Old Coyote under the provisions of 28 U.S.C. § 1343(3). That section provides that:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

....

(3) To redress the deprivation, under the color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

Jurisdiction under § 1343(3) does not turn upon satisfaction of a minimum amount-in-controversy requirement. *Lynch v. Household Finance Corp.*, 405 U.S. 538, 92 S.Ct. 1113, 31 L.Ed.2d 424 (1972).

The defendants argue that 28 U.S.C. § 1341 is a bar to this Court's jurisdiction under § 1343. Section 1341 states:

The District Courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

The plaintiffs have argued, and correctly so, citing *Confederated Salish and Kootenai Tribes v. Moe*, 392 F.Supp. 1297 (D.Mont.1974), *aff'd* 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976), that

... the exception [from the bar of 1341] applies even where, as here, the United States is not a party plaintiff, if the suit could have been brought by the United States and is in fact brought by parties who could properly be co-plaintiffs with the United States. ... *Moe*, 392 F.Supp. at 1302.

However, the only challenge to the Montana taxes offered by the individual plaintiffs is that the taxes constitute a violation of their civil rights. Although § 1341 does not bar the claims of the Tribe, *Moe, supra*, it bars jurisdiction even when the Court could have accepted jurisdiction pursuant to 42 U.S.C. § 1983 (civil rights violations), 28 U.S.C. §§ 1343 and 1331. *Bland v. McHann*, 463 F.2d 21 (5th Cir. 1972), *cert. denied*, 410 U.S. 966, 93 S.Ct. 1438, 35 L.Ed.2d 700 (1973); *Gray v. Morgan*, 371 F.2d 172 (7th Cir. 1966), *cert. denied*, 386 U.S. 1033, 87 S.Ct. 1484, 18 L.Ed.2d 596 (1967). The individually named plaintiffs' complaint, as based upon a federal question or alleged violations of their civil rights, does not avoid the jurisdictional prohibition contained in 28 U.S.C. § 1341. *Hickmann v. Wujick*, 488 F.2d 875 (2nd Cir. 1973). It is evident that the State of Montana's motion to dismiss the claims of the individually named plaintiffs for want of subject matter jurisdiction is well taken.

On the basis of the foregoing,

IT IS ORDERED that the State of Montana's motion to dismiss the Second Amended Complaint for failure to state a claim upon which relief may be granted be, and the same hereby is, granted.

IT IS FURTHER ORDERED that the State of Montana's motion to dismiss the claims of the individually named plaintiffs, Horn, Hogan, Yellowtail, and Old Coyote, for want of subject matter jurisdiction be, and the same hereby is, granted.

The Clerk is directed to enter judgment by separate document in accordance with this memorandum opinion and order.

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NOT FOR PUBLICATION  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

THE CROW TRIBE OF INDIANS,	)	
Plaintiff-Appellant,	)	No. 95-35093
and	)	
UNITED STATES OF AMERICA,	)	D.C. No.
Plaintiff-Intervenor,	)	CV-78-00110-BLG
v.	)	
STATE OF MONTANA, Director,	)	
Ken Nordtvedt; COUNTY OF BIG	)	
HORN; TREASURER, BIG HORN	)	
COUNTY, MARTHA FLETCHER,	)	
Defendants-Appellees.	)	
<hr/>		
THE CROW TRIBE OF INDIANS,	)	
Plaintiff,	)	No. 95-35096
and	)	
UNITED STATES OF AMERICA,	)	D.C. No.
Plaintiff-Intervenor-	)	CV-78-00110-JDS
Appellant,	)	
v.	)	ORDER
STATE OF MONTANA, Director,	)	(Filed
Ken Nordtvedt; COUNTY OF BIG	)	Feb. 21, 1997)
HORN; TREASURER, BIG HORN	)	
COUNTY, MARTHA FLETCHER,	)	
Defendants-Appellees.	)	

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Before: BROWNING, WRIGHT, and CANBY, Circuit  
Judges

The panel has voted to deny Appellee State of Montana's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for an en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b). Judge Thomas recused himself.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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**§ 396a. Leases of unallotted lands for mining purposes; duration of leases**

On and after May 11, 1938, unallotted lands within any Indian reservation or lands owned by any tribe, group, or band of Indians under Federal jurisdiction, except those specifically excepted from the provisions of sections 396a to 396g of this title, may, with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal council or other authorized spokesmen for such Indians, for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities.

**§ 396b. Public auction of oil and gas leases; requirements**

Leases for oil- and/or gas-mining purposes covering such unallotted lands shall be offered for sale to the highest responsible qualified bidder, at public auction or on sealed bids, after notice and advertisement, upon such terms and subject to such conditions as the Secretary of the Interior may prescribe. Such advertisement shall reserve to the Secretary of the Interior the right to reject all bids whenever in his judgment the interest of the Indians will be served by so doing, and if no satisfactory bid is received, or the accepted bidder fails to complete the lease, or the Secretary of the Interior shall determine that it is unwise in the interest of the Indians to accept the highest bid, said Secretary may readvertise such lease for sale, or with the consent of the tribal council or other governing tribal authorities, a lease may be made by

private negotiations: *Provided*, That the foregoing provisions shall in no manner restrict the right of tribes organized and incorporated under sections 476 and 477 of this title, to lease lands for mining purposes as therein provided and in accordance with the provisions of any constitution and charter adopted by an Indian tribe pursuant to sections 461, 462, 463, 464, 465, 466 to 470, 471 to 473, 474, 475, 476 to 478, and 479 of this title.

**§ 396c. Lessees of restricted lands to furnish bonds for performance**

On and after May 11, 1938, lessees of restricted Indian lands, tribal or allotted, for mining purposes, including oil and gas, shall furnish corporate surety bonds, in amounts satisfactory to the Secretary of the Interior, guaranteeing compliance with the terms of their leases: *Provided*, That personal surety bonds may be accepted where the sureties deposit as collateral with the said Secretary of the Interior any public-debt obligations of the United States guaranteed as to principal and interest by the United States equal to the full amount of such bonds, or other collateral satisfactory to the Secretary of the Interior, or show ownership to unencumbered real estate of a value equal to twice the amount of the bonds.

**§ 396d. Rules and regulations governing operations; limitations on oil or gas leases**

All operations under any oil, gas, or other mineral lease issued pursuant to the terms of sections 396a to 396g of this title or any other Act affecting restricted

Indian lands shall be subject to the rules and regulations promulgated by the Secretary of the Interior. In the discretion of the said Secretary, any lease for oil or gas issued under the provisions of sections 396a to 396g of this title shall be made subject to the terms of any reasonable cooperative unit or other plan approved or prescribed by said Secretary prior or subsequent to the issuance of any such lease which involves the development or production of oil or gas from land covered by such lease.

**§ 396e. Officials authorized to approve leases**

The Secretary of the Interior may, in his discretion, authorize superintendents or other officials in the Indian Service to approve leases for oil, gas, or other mining purposes covering any restricted Indian lands, tribal or allotted.

**§ 396f. Lands excepted from leasing provisions**

Sections 396a, 396b, 396c, and 396d of this title shall not apply to the Crow Reservation in Montana, the ceded lands of the Shoshone Reservation in Wyoming, the Osage Reservation in Oklahoma, nor to the coal and asphalt lands of the Choctaw and Chickasaw Tribes in Oklahoma.

**396g. Subsurface storage of oil or gas**

The Secretary of the Interior, to avoid waste or to promote the conservation of natural resources or the welfare of the Indians, is authorized in his discretion to approve leases of lands that are subject to lease under section 396 or 396a of this title, or the subsurface storage of oil and gas, irrespective of the lands from which initially produced, and the Secretary is authorized, in order to provide for the subsurface storage of oil or gas, to approve modifications, amendments, or extensions of the oil and gas or other mining lease(s), if any, in effect as to restrict Indian lands, tribal or allotted, and may promulgate rules and regulations consistent with such leases, modifications, amendments, and extensions, relating to the storage of oil or gas thereunder. Any such leases may provide for the payment of a storage fee or rental on such stored oil or gas or, in lieu of such fee or rental, for a royalty other than that prescribed in the lease when such stored oil or gas is produced in conjunction with oil or gas not previously produced. It may be provided that any oil and gas lease under which storage of oil or gas is so authorized shall be continued in effect at least for the period of such storage use and so long thereafter as oil or gas not previously produced is produced in paying quantities.

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## CHAPTER NO. 525

AN ACT REVISING THE TAXATION OF COAL PRODUCTION; PROVIDING FOR A SEVERANCE TAX ON COAL PRODUCED AT A PERCENTAGE OF VALUE; DELETING COAL FROM THE PROVISIONS TAXING THE NET PROCEEDS OF MINES; PROVIDING FOR TAXATION OF THE GROSS PROCEEDS FROM COAL AS AN ELEMENT IN THE PROPERTY TAX SYSTEM; PROVIDING FOR CERTAIN ROYALTIES; AMENDING SECTIONS 84-301, 84-302, 84-1309.1, AND 84-5402; AND REPEALING SECTIONS 84-1301 THROUGH 84-1309, 84-1310, AND 84-1311, R.C.M. 1947.

*Be it enacted by the Legislature of the State of Montana:*

Section 1. There is a new R.C.M. section numbered 84-1312 that reads as follows:

**84-1312. Legislative findings and declarations of purpose.** (1) The legislature finds that while coal is extracted from the earth like metal minerals, there are differences between coal and metal minerals such that they should be classified in different categories for taxation purposes. The legislature finds that while coal can be utilized like petroleum products, there are differences between coal and petroleum such that they should be classified in different categories for taxation purposes. The legislature further finds that:

(a) coal is the only mineral which can supply energy while being easily found in abundance in Montana;

(b) coal is the only mineral which is so often marketed through sales contracts of many years' duration;

(c) coal, unlike most minerals, varies widely in composition and consequent value when marketed;

(d) coal in Montana is subject to regional and national demands for development which could affect the economy and environment of a larger portion of the state than any other mineral development has done;

(e) coal in Montana, when sub-bituminous and recoverable by strip mining, is in sufficient demand that at least one-third ( $\frac{1}{3}$ ) of the price it commands at the mine may go to the economic rents of royalties and production taxes;

(f) coal in the lignite form is in less demand and producers of lignite are able to pay lesser amounts of royalty and production tax than producers of sub-bituminous can pay;

(g) coal produced in underground mines has higher production costs and underground producers are able to pay lesser amounts of royalty and production tax than strip-mine producers can pay;

(h) coal production in Montana has been subject to an uncoordinated array of taxes which overlap one another and yield revenue in an inconsistent and unpredictable manner.

(2) The legislature declares that the purposes of this chapter are:

(a) to allow the severance taxes on coal production to remain a constant percentage of the price of coal;

(b) to stabilize the flow of tax revenue from coal mines to local governments through the property taxation system;

(c) to simplify the structure of coal taxation in Montana, reducing tax overlap and improving the predictability of tax projections; and

(d) to accomplish the foregoing purposes by establishing categories of taxation which recognize the unique character of coal as well as the variations found within the coal industry.

Section 2. There is a new R.C.M. section numbered 84-1313 that reads as follows:

**84-1313. Definitions.** As used in this chapter: (1) "Contract sales price" means either (a) the price of coal extracted and prepared for shipment f.o.b. mine, excluding that amount charged by the seller to pay taxes paid on production, or (b) a price imputed by the department under section 84-1318.

(2) "Energy conversion process" includes any process by which coal in the solid state is transformed into slurry, gas, electric energy, or any other form of energy.

(3) "Produced" means severed from the earth.

(4) "Strip mining" or "surface mining" is defined in section 50-1036.

(5) "Underground mining" means a coal mining method utilizing shafts and tunnels, and not regulated under section 50-1039.

(6) "Ton" means two thousand (2,000) pounds.

(7) "Department" means the department of revenue.

(8) "Taxes paid on production" include any tax paid to the federal, state, or local governments upon the quantity of coal produced as a function of either the volume or the value of production, and do not include any tax upon the value of mining equipment, machinery, or buildings and lands, any tax upon a person's net income derived in whole or in part from the sale of coal, or any license fee.

Section 3. There is a new R.C.M. section numbered 84-1314 that reads as follows:

**84-1314. Severance tax - rates imposed - exemptions.** A severance tax is imposed on each ton of coal produced in the state, in accordance with the following schedule:

Heating quality (Btu per pound of coal):	Surface Mining	Underground Mining
Under 7,000	12 cents or 20% of value	5 cents or 3% of value
7,000-8,000	22 cents or 30% of value	8 cents or 4% of value
8,000-9,000	34 cents or 30% of value	10 cents or 4% of value
Over 9,000	40 cents or 30% of value	12 cents or 4% of value

The formula which yields the greater amount of tax in a particular case shall be used at each point on this schedule. "Value" means the contract sales price. A person is not liable for any severance tax upon the first five thousand (5,000) tons of coal he produces in a quarter-year.

Section 4. There is a new R.C.M. section numbered 84-1315 that reads as follows:

**84-1315. Quarterly statement and payment of tax.** Each coal mine operator shall compute the severance tax due on each quarter-year's worth of production on forms prescribed by the department. The statement shall indicate the tonnage produced, the average Btu value of the production, the contract sales price received for the production, and such other information as the department may require. The complete form in duplicate, with the tax payment, shall be delivered to the department not later than thirty (30) days following the close of the quarter. The form shall be verified by an officer of the coal mine operator. A person operating more than one coal mine in this state may include all of his mines in one statement. The department may grant a reasonable extension of time for filing statements and payments of taxes due upon good cause shown therefore.

Section 5. There is a new R.C.M. section numbered 84-1316 that reads as follows:

**84-1316. Penalty for delinquent tax.** The department shall add to the amount of all delinquent severance taxes a penalty of ten percent (10%) of the delinquent amount plus interest at the rate of one percent (1%) per month or fraction thereof computed on the total amount of severance tax and penalty. Interest shall be computed from the date the severance tax was due to the date of payment. The department shall mail to the person required to file a quarterly report and pay any severance tax, a letter setting forth the amount of tax, penalty and interest due, and the letter shall further contain a statement that if

payment is not made within fifteen (15) days a lien may be filed as set forth in section 84-1323. The penalty amount may be waived by the department if reasonable cause for the failure or neglect to file the quarterly statement is provided to the department.

Section 6. There is a new R.C.M. section numbered 84-1317 that reads as follows:

**84-1317. Annual testing of samples.** The Montana state bureau of mines and geology shall test coal production subject to this chapter and may make rules governing the collection of test data. A person subject to this chapter shall submit to the bureau on or before August 1 each year a sample of mine run "as is" coal from each mine producing that year. Additional samples shall be submitted at the request of the bureau. The bureau shall compute the Btu per pound of each sample received and forward this information to the department prior to September 1 each year.

Section 7. There is a new R.C.M. section numbered 84-1318 that reads as follows:

**§ 84-1318. When value of coal may be imputed - procedure.** In a case where

(a) the operator of a coal mine is using the produced coal in an energy conversion or other manufacturing process, or

(b) a person sells coal under a contract which is not an arm's-length agreement, or

(c) a person neglects or refuses to file a statement and tax return under this chapter, the department may impute a value to the coal which approximates market

value f.o.b. mine. When imputing value, the department may apply the factors used by the federal government under 26 U.S.C. section 613, or that provision as it may be labelled or amended, in determining gross income from mining, or the department may apply any other or additional criteria it considers appropriate. Each subject taxpayer shall, upon request by the department, furnish a copy of its federal income tax return, with any amendments, filed for the year in which the value of coal is being imputed and copies of the contracts under which it is selling coal at the time. When the department's estimate of market value is contested in any proceeding, the burden of proof is on the contesting party.

Section 8. Section 84-1309.1, R.C.M. 1947, is renumbered 84-1319, and is amended to read as follows:

**"84-1319. Disposal of license or severance taxes.** License or severance taxes collected under the provisions of this chapter or such sections as may enact a severance tax on coal in 1975 are allocated as follows:

(1) To the county for such purposes as the governing body of that county may determine from which coal was mined for each calendar year prior to January 1, 1980, three cents (3¢) per ton or four percent (4%) of the severance tax paid on the coal mined in that county, whichever is higher and for each calendar year following December 31, 1979, this amount shall be three cents (3¢) per ton or three and one-half percent (3½%) of the severance tax on the coal mined in that county, whichever is higher.

(2) To the earmarked revenue fund, such portions of the severance tax as may be authorized by laws enacted in 1975.

(3) All other revenues from license or severance taxes collected under the provisions of this chapter shall be deposited to the credit of the general fund of the state."

Section 9. There is a new R.C.M. section numbered 84-1320 that reads as follows:

**84-1320. Reporting gross proceeds from coal.** Each person engaged in mining coal must, on or before March 31 each year file with the department a statement of the gross yield from each coal mine owned or worked by such person in the preceding calendar year, and the value thereof. The statement shall be in the form prescribed by the department of revenue, which may be coordinated with the form used under section 84-1316, and must be verified by an officer of the firm. The statement shall include:

(1) The name and address of the owner or lessee or operator of the mine.

(2) The location of the mine.

(3) The tons of ore extracted, treated, and sold from the mine during the taxable period.

(4) The gross yield or value in dollars and cents derived from the contract sales price.

Section 10. There is a new R.C.M. section numbered 84-1321 that reads as follows:

**84-1321. Transmission of gross proceeds from coal to county assessor.** On or before July 1 each year the department shall transmit to the county assessor of each county in which coal mines are situated, the valuation of the gross proceeds of such mines for the purpose of

taxation, as the same have been determined by the department. The county assessor shall immediately enter the same upon a suitable assessment roll, the form of which shall be prescribed by the department.

Section 11. There is a new R.C.M. section numbered 84-1322 that reads as follows:

**84-1322. Taxation of gross proceeds from coal.** The county assessor shall prepare from the reported gross proceeds from coal a tax roll, which he shall transmit to the county treasurer on or before September 15 each year. The county treasurer shall proceed to give full notice thereof to each coal producer and to collect the taxes due within sixty (60) days after mailing.

Section 12. There is a new R.C.M. section numbered 84-1323 that reads as follows:

**84-1323. Lien of tax - enforcement of payment.** The tax on gross proceeds from coal shall be levied as taxes on other forms of property, and this tax and the severance tax on coal production are each a lien upon the coal mine and a prior lien upon all personal property and improvements used to produce the coal. These taxes may be collected by the seizure and sale of the personal property on which the tax is a lien, as provided under sections 84-4202 through 84-4211, or by suit under sections 84-4301 through 84-4302.

\* \* \*

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STEVEN E. CARROLL  
Attorney, Department of Justice  
Land and Natural Resources Division  
Indian Resources Section  
P.O. Box 44378  
Washington, D.C. 20026-4378  
(202) 272-5750

Attorney for Plaintiff-Intervenor  
United States of America

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
BILLINGS DIVISION

THE CROW TRIBE OF  
INDIANS, )

Plaintiff, )

UNITED STATES OF AMERICA, )

Plaintiff-Intervenor, )

vs. )

STATE OF MONTANA; DENIS )

ADAMS, Director, Montana )

Department of Revenue; BIG )

HORN COUNTY, Montana; )

Lorraine Hamilton, Treasurer, )

Big Horn County, Montana, )

Defendants, )

WESTMORELAND RESOURCES, )

INC., )

Defendant-Intervenor. )

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No. CV-78-110-BLG

PLAINTIFF-  
INTERVENOR'S  
FIRST AMENDED  
COMPLAINT

### JURISDICTION

1. Comes now the Attorney General at the request of the Secretary of the Interior and alleges as follows. Plaintiff-Intervenor, United States, in this first amended complaint seeks restitution and equitable relief. Plaintiff-Intervenor's claims arise under Article I, Section 8, Clause 3, the Indian Commerce Clause, and Article VI, Clause 2, the Supremacy Clause, of the Constitution of the United States; under the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a *et seq*; and under the Fort Laramie Treaty of May 7, 1868, 15 Stat. 649, II Kappler 1108. This Court has jurisdiction under 28 U.S.C. § 1345.

### PARTIES

2. Plaintiff-Intervenor, the UNITED STATES, is the trustee of the coal which is the subject of this lawsuit on behalf of the Crow Tribe. Further, the United States is entitled to hold in trust all tax proceeds on the coal held in trust by the United States.

3. Plaintiff CROW TRIBE OF INDIANS (hereinafter "the Tribe") is a sovereign American Indian tribe, with a governing body, the Crow Tribal Council, duly recognized by the Secretary of the Interior.

4. Defendant STATE OF MONTANA (hereinafter "State" or "Montana") is a State of the Union, pursuant to the Enabling Act of February 22, 1889, 22 Stat. 676.

5. Defendant DENIS ADAMS is Director of the Montana Department of Revenue. He is sued in his official capacity; his official address is: Department of Revenue, Sam W. Mitchell Building, Rm. 455, Helena, Montana 59620.

6. Defendant BIG HORN COUNTY, Montana, is a political subdivision of the State. Part of the Crow Indian Reservation and of the Crow Tribe's reserved coal resources is encompassed within the exterior boundaries of Big Horn County.

7. Defendant LORRAINE HAMILTON is Treasurer of Big Horn County, Montana. She is sued in her official capacity; her official address is: County Courthouse, Drawer H, Hardin, Montana 59034.

### FACTUAL ALLEGATIONS

8. The United States holds in trust and the Tribe is the beneficial owner of vast coal resources underlying the Crow Reservation and an area known as the "ceded area" that was opened to allotment and settlement by non-Indians pursuant to the Act of April 17, 1904, 33 Stat. 352. The coal underlying the ceded strip is a component part of the reservation. The United States manages and supervises the Tribe's trust assets through the Department of the Interior and the Bureau of Indian Affairs (hereinafter "BIA").

9. On September 16, 1970, Westmoreland Resources, Inc. (hereinafter "Westmoreland") was the successful bidder at a sale of prospecting permits covering Crow coal underlying 34,671 acres in the ceded area. On June 6, 1972, Westmoreland and the Tribe executed two leases embracing the coal underlying 30,876.25 acres of that land. The Westmoreland leases were approved by the BIA on June 14, 1972. Those leases were subsequently amended, and the amended Westmoreland leases were approved on December 6, 1974. One of the leases, which

encompassed approximately 16,130 acres, was subsequently terminated by mutual consent of the Tribe and Westmoreland with the approval of the Department of the Interior. Westmoreland is the only lessee currently mining Crow coal. The existing lease was amended by agreement dated July 10, 1982, which was approved by the BIA on September 29, 1982.

10. On May 8, 1980, the Tribe entered into a lease with the Shell Oil Company embracing Crow coal underlying approximately 2,560 acres within the Crow Indian Reservation. This agreement also included various options for mining Crow coal underlying additional acreage within the Crow Reservation. This lease was relinquished by Shell because it could not find buyers at the price it would have to charge with Montana's coal taxes included.

11. In 1975, the State enacted statutes which imposed on coal mine operators a severance tax on each ton of coal produced in the State and a gross proceeds tax on the sale of each ton of coal produced in the State. Montana Code Annotated §§ 15-35-101 through 15-35-111, 15-23-701 through 15-23-704.

12. Defendants Denis Adams and Lorraine Hamilton are the state and county officials charged by Montana law with the enforcement and collection of the Montana coal severance and gross proceeds taxes.

13. Between 1975 and 1983, Westmoreland paid more than \$54,000,000 in severance taxes to Montana on the production of coal mined under the Crow lease.

14. Between 1975 and 1988, Westmoreland paid more than \$11,000,000 in gross proceeds taxes to the Defendant Big Horn County based upon production and sale of coal mined from the Crow lease.

15. Severance taxes after January 1, 1983 pursuant to Court order were paid into the Court Registry. Gross proceeds taxes after November 25, 1987, pursuant to Court order were paid into the Court registry. The Montana coal taxes are invalid, having been preempted by Federal law, and are void because they interfere with tribal self government. Accordingly, in May, 1989, this Court paid over approximately \$30,000,000 from the Court Registry to the United States in trust for the Crow Tribe.

16. There are approximately 8,000 members of the plaintiff Tribe, approximately 4,500 of whom reside on the Crow Indian Reservation. The Crow people retain a significant degree of tribal culture, maintaining the Crow language and Crow tribal ceremonies and customs. To date, the Crow people have generally derived meager economic sustenance through the ownership and use of farming and grazing lands on the reservation. Historically, the Crow people have suffered from extremely high rates of unemployment and a very poor economic status. Coal is the principal asset of the Crow Tribe from which funds can be derived to provide for economic development.

17. The Crow Tribe and its members are severely impoverished. The Tribe does not have sufficient revenues to provide adequate services. The unemployment rate among tribal members is much higher than among

the non-Indian populations of Montana and adjacent states.

18. In 1976 the Crow Tribe enacted a severance tax on coal mined on the Crow Reservation. Coal underlying the ceded strip is a component of the Reservation, and the Tribal severance taxes were at all times valid as to the coal mined from the ceded strip. In 1982 the Tribe and Westmoreland entered into an amended lease pursuant to which Westmoreland agreed to pay to the Tribe a tax equal to the Montana coal taxes less whatever amounts Westmoreland was required to pay Montana.

19. The rate of Montana's coal severance tax was so high that assessment and collection of the severance tax and the gross proceeds tax resulted in appropriation of substantially all of the economic rent and value of the Tribe's coal. The Montana coal taxes: (a) made Crow coal less competitive; (b) reduced the amount of Crow coal which would have been mined; (c) prevented and limited the Tribe from entering into other coal leases and the production of leased coal; (d) prevented collection of Tribal coal taxes; (e) reduced royalty payments to the Crow Tribe; (f) prevented the economic development of the Crow Reservation; (g) reduced the ability of the Tribe to renegotiate its leases with Westmoreland and others; (h) reduced or eliminated the ability of the Tribe to enter into arrangements for the mining and sale of Crow coal; (i) prevented the Tribal government from providing essential governmental services; (j) and interfered with the Tribe's sovereign right to govern its reservation.

20. Prior to and since the enactment of the Montana coal tax laws Crow Tribal representatives have consistently asserted the invalidity and protested the imposition of the Montana taxes as applied to Crow coal.

#### FIRST CAUSE OF ACTION IN ASSUMPSIT FOR MONEY HAD AND RECEIVED

Plaintiff-Intervenor repeats and realleges by reference the allegations set forth in paragraphs 1 through 20.

21. Montana and the Defendant Big Horn County, between 1975 and 1983 as to severance taxes and 1975 and 1988 as to gross proceeds taxes, collected taxes on coal produced from the Crow Tribe's Reservation in the approximate amount of \$65,000,000.00 The statutes purporting to sanction collection of the taxes were void and the monies were illegally collected. The Tribe was entitled to receive such funds as owner of the coal and pursuant to valid Tribal coal taxes and contracts.

22. The Crow coal production was substantially the only source of funds for the maintenance and economic development of the Crow Tribe. Montana had many sources of revenue and established a trust fund into which a portion of the taxes collected were paid.

23. If defendants are allowed to keep the funds collected as taxes, they would be unjustly enriched. Defendants have no legal or equitable right to retain the monies illegally collected. In equity and good conscience such monies belong to the United States to be held in trust for the Tribe, and in equity and justice such monies should be paid over to the United States to be held in

trust for the Tribe by defendants, together with interest thereon.

## SECOND CAUSE OF ACTION

Plaintiff-Intervenor repeats and realleges by reference the allegations set forth in paragraphs 1 through 23.

24. The monies received by Defendant Montana and the Defendant Counties were illegally collected under void statutes. It would be unjust and inequitable to allow defendants to retain such monies; defendants have no right, legal or equitable, to such monies. The United States on behalf of the Crow Tribe as owner of the coal and by reason of the Tribe's valid tax ordinances and statutes and the amended lease agreement is legally and equitably entitled to such monies together with interest thereon from the dates collected. Unless such monies are awarded to the United States to be held on behalf of the Tribe, defendants will be unjustly enriched. A constructive trust in favor of the Tribe should be imposed on all monies collected, together with interest thereon until such monies are paid over to the United States to be held in trust for the Tribe.

WHEREFORE, Plaintiff-Intervenor prays for the following relief:

1. A judgment awarding the United States on behalf of the Crow Tribe an amount equal to all severance and gross proceeds taxes that have been paid to the Defendants Montana and Big Horn County between 1975 and 1982 as to severance taxes and between 1975 and 1988 as

to gross proceeds taxes on production of Crow coal, together with interest thereon from the dates paid.

2. For a judgment declaring a constructive trust in favor of the United States on behalf of the Crow Tribe on all monies paid as taxes on the production of Crow coal from 1975 through 1983 as to severance taxes and from 1975 through 1988 as to gross proceeds taxes together with interest thereon until such sums are paid over to the United States on behalf of the Crow Tribe.

3. A judgment awarding the United States its costs of suit, expert witness fees, and attorneys fees.

4. For such additional relief as the Court may deem just and equitable.

Respectfully submitted,

/s/ Steven E. Carroll

STEVEN E. CARROLL,

Attorney

Indian Resources Section

Land and Natural Resources

Division

P.O. Box 44378

Washington, D.C. 20026-4378

(202) 272-5750

Daniel M. Rosenfelt  
ROSENFELT, BARLOW & BORG, P.A.  
1805 Carlisle, N.E.  
P.O. Box 25245  
Albuquerque, NM 87125  
(505) 266-3441

Harold G. Stanton  
P.O. Drawer G  
Hardin, MT 59034  
(406) 665-1510

Attorneys for Plaintiff  
The Crow Tribe of Indians

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
BILLINGS DIVISION

THE CROW TRIBE OF INDIANS,	)	
Plaintiff,	)	No. CV-78-110-
	)	BLG
UNITED STATES OF AMERICA,	)	
Plaintiff-Intervenor,	)	
vs.	)	FOURTH
	)	AMENDED
STATE OF MONTANA; KEN	)	COMPLAINT
NORDTVEDT, Director, Montana	)	FOR
Department of Revenue; BIG	)	RESTITUTION
HORN COUNTY, Montana;	)	
Lorraine Hamilton, Treasurer,	)	
Big Horn County, Montana,	)	
Defendants,	)	
WESTMORELAND RESOURCES,	)	
INC.,	)	
Defendant-Intervenor.	)	

Plaintiff CROW TRIBE OF INDIANS alleges:

# JURISDICTION

1. Plaintiff Crow Tribe seeks restitution and equitable relief. Plaintiff's claims arise under Article I, Section 8, Clause 3 and Article VI of the Constitution of the United States; under the Indian Mineral Leasing Act of 1938, 25 U.S.C. 396a et seq; and under the Fort Laramie Treaty of May 7, 1868, 15 Stat. 649, II Kappler 1108. This Court has jurisdiction under 28 U.S.C. §§ 1331 and 1362.

# PARTIES

2. Plaintiff CROW TRIBE OF INDIANS (hereinafter "the Tribe") is a sovereign American Indian tribe, with a governing body, the Crow Tribal Council, duly recognized by the United States Secretary of the Interior.

3. Defendant STATE OF MONTANA (hereinafter "State" or "Montana") is a State of the Union, pursuant to the Enabling Act of February 22, 1889, 22 Stat. 676.

4. Defendant Ken Nordtvedt is Director of the Montana Department of Revenue. He is sued in his official capacity; his official address is: Department of Revenue, Sam W. Mitchell Building, Rm. 455, Helena, Montana 59620.

5. Defendant BIG HORN COUNTY, Montana, is a political subdivision of the State. Part of the Crow Indian Reservation and of the Crow Tribe's reserved coal resources is encompassed within the exterior boundaries of Big Horn County.

6. Defendant Lorraine Hamilton is Treasurer of Big Horn County, Montana. She is sued in her official capacity; her official address is: County Courthouse, Drawer H, Hardin, Montana 59034.

7. The United States holds in trust and the Tribe is the beneficial owner of vast coal resources underlying the Crow Reservation and an area known as the "ceded area" that was opened to allotment and settlement by non-Indians pursuant to the Act of April 17, 1904, 33 Stat. 352. The coal underlying the ceded strip is a component part of the reservation. The United States manages and supervises the Tribe's trust assets through the Department of the Interior and the Bureau of Indian Affairs (hereinafter "BIA").

8. On September 16, 1970, Westmoreland Resources, Inc. (hereinafter "Westmoreland") was the successful bidder at a sale or prospecting permits covering Crow coal underlying 34,671 acres in the ceded area. On June 6, 1972, Westmoreland and the Tribe executed two leases embracing the coal underlying 30,876.25 acres of that land. The Westmoreland leases were approved by the BIA on June 14, 1972. Those leases were subsequently amended, and the amended Westmoreland leases were approved on December 6, 1974. One of the leases, which encompassed approximately 16,130 acres, was subsequently terminated by mutual consent of the Tribe and Westmoreland with the approval of the Department of the Interior. Westmoreland is the only lessee currently mining Crow coal. The existing lease was amended by agreement dated July 10, 1982, which was approved by the BIA on September 29, 1982.

9. On May 8, 1980, the Tribe entered into a lease with the Shell Oil Company embracing Crow coal underlying approximately 2,560 acres within the Crow Indian Reservation. This agreement also included various options for mining Crow coal underlying additional acreage within the Crow Reservation. This lease was relinquished by Shell because it could not find buyers at the price it would have to charge with Montana's coal taxes included.

10. In 1975, the State enacted statutes which imposed on coal mine operators a severance tax on each ton of coal produced in the State and a gross proceeds tax on the sale of each ton of coal produced in the State. Montana Code Annotated §§ 15-35-101 through 15-35-111, 15-23-701 through 15-23-704.

11. Defendants Ken Nordtvedt and Lorraine Hamilton are the state and county officials charged by Montana law with the enforcement and collection of the Montana coal severance and gross proceeds taxes.

12. Between 1975 and 1983, Westmoreland paid more than \$54,000,000 in severance taxes to Montana on the production of coal mined under the Crow lease.

13. Between 1975 and 1988, Westmoreland paid more than \$11,000,000 in gross proceeds taxes to the Defendant Big Horn County based upon production and sale of coal mined from the Crow lease.

14. Severance taxes after January 1, 1983 pursuant to Court order were paid into the Court Registry. Gross proceeds taxes after November 25, 1987, pursuant to

Court order were paid into the Court registry. The Montana coal taxes are invalid having been preempted by Federal law and are void because they interfere with tribal self government. Accordingly, in May, 1989, this Court paid over approximately \$30,000,000 from the Court Registry to the United States in trust for the Crow Tribe.

15. There are approximately 8,000 members of the plaintiff Tribe, approximately 4,500 of whom reside on the Crow Indian Reservation. The Crow people retain a significant degree of tribal culture, maintaining the Crow language and Crow tribal ceremonies and customs. To date, the Crow people have generally derived meager economic sustenance through the ownership and use of farming and grazing lands on the reservation. Historically, the Crow people have suffered from extremely high rates of unemployment and a very poor economic status. Coal is the principal asset of the Crow Tribe from which funds can be derived to provide for economic development.

16. The Crow Tribe and its members are severely impoverished. The Tribe does not have sufficient revenues to provide adequate services. The unemployment rate among tribal members is much higher than among the non-Indian populations of Montana and adjacent states.

17. In 1976 the Crow Tribe enacted a severance tax on coal mined on the Crow Reservation. Coal underlying the ceded strip is a component of the Reservation, and the Tribal severance taxes were at all times valid as to the coal mined from the ceded strip. In 1982 the Tribe and

Westmoreland entered into an amended lease pursuant to which Westmoreland agreed to pay to the Tribe a tax equal to the Montana coal taxes less whatever amounts Westmoreland was required to pay Montana.

18. The rate of Montana's coal severance tax was so high that assessment and collection of the severance tax and the gross proceeds tax resulted in appropriation of substantially all of the economic rent and value of the Tribe's coal. The Montana coal taxes: (a) made Crow coal less competitive; (b) reduced the amount of Crow coal which would have been mined; (c) prevented and limited the Tribe from entering into other coal leases and the production of leased coal; (d) prevented collection of Tribal coal taxes; (e) reduced royalty payments to the Crow Tribe; (f) prevented the economic development of the Crow Reservation; (g) reduced the ability of the Tribe to renegotiate its leases with Westmoreland and others; (h) reduced or eliminated the ability of the Tribe to enter into arrangements for the mining and sale of Crow coal; (i) prevented the Tribal government from providing essential governmental services; (j) and interfered with the Tribe's sovereign right to govern its reservation.

19. Prior to and since the enactment of the Montana coal tax laws Crow Tribal representatives have consistently asserted the invalidity and protested the imposition of the Montana taxes as applied to Crow coal.

#### **FIRST CAUSE OF ACTION IN ASSUMPSIT FOR MONEY HAD AND RECEIVED**

Plaintiff repeats and realleges by reference the allegations set forth in paragraphs 1 through 19.

20. Montana and the Defendant Big Horn County, between 1975 and 1983 as to severance taxes and 1975 and 1988 as to gross proceeds taxes, collected taxes on coal produced from the Crow Tribe's Reservation in the approximate amount of \$60,000,000. The statutes purporting to sanction collection of the taxes were void and the monies were illegally collected. The Tribe was entitled to receive such funds as owner of the coal and pursuant to valid Tribal coal taxes and contracts.

21. The Crow coal production was substantially the only source of funds for the maintenance and economic development of the Crow Tribe. Montana had many sources of revenue and established a trust fund into which a portion of the taxes collected were paid.

22. If defendants are allowed to keep the funds collected as taxes, they would be unjustly enriched. Defendants have no legal or equitable right to retain the monies illegally collected. In equity and good conscience such monies belong to the Tribe, and in equity and justice such monies should be paid over to the Tribe by defendants, together with interest thereon.

## SECOND CAUSE OF ACTION

Plaintiff repeats and realleges by reference the allegations set forth in paragraphs 1 through 22.

23. The monies received by Defendant Montana and the Defendant Counties were illegally collected under void statutes. It would be unjust and inequitable to allow defendants to retain such monies; defendants have no right, legal or equitable, to such monies. The Crow Tribe

as owner of the coal and by reason of its valid tax ordinances and statutes and the amended lease agreement is legally and equitably entitled to such monies together with interest thereon from the dates collected. Unless such monies are awarded to the Tribe, defendants will be unjustly enriched. A constructive trust in favor of the Tribe should be imposed on all monies collected, together with interest thereon until such monies are paid over to the Tribe.

**WHEREFORE**, Plaintiff prays for the following relief:

1. A judgment awarding the Crow Tribe an amount equal to all severance and gross proceeds taxes that have been paid to the Defendants Montana and Big Horn County between 1975 and 1982 as to severance taxes and between 1975 and 1988 as to gross proceeds taxes on production of Crow coal, together with interest thereon from the dates paid.

2. For a judgment declaring a constructive trust in favor of the Crow Tribe on all monies paid as taxes on the production of Crow coal from 1975 through 1983 as to severance taxes and from 1975 through 1988 as to gross proceeds taxes together with interest thereon until such sums are paid over to the Tribe.

3. A judgment awarding the Crow Tribe its costs of suit, expert witness fees, and attorneys fees.

4. For such additional relief as the Court may deem just and equitable.

Respectfully submitted:

ROSENFELT, BARLOW &  
BORG, P.A.

By: /s/ Daniel M. Rosenfelt  
DANIEL M. ROSENFELT  
1805 Carlisle, N.E.  
P.O. Box 25245  
Albuquerque, NM 87125  
(505) 266-3441  
  
Harold G. Stanton  
P.O. Drawer G  
Hardin, MT 59034  
(406) 665-1510  
  
Attorneys for Plaintiff  
The Crow Tribe of Indians

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